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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 4, 2020

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SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

DILL v. LOISEAU

[263 N.C. App. 468 (2019)]

ELFORD C. DILL, PLAINTIFF
v.
GERARD G. LOISEAU AND WIFE JENNIFER O. LOISEAU, APRIL B. COTTRILL AND HUSBAND SHANNON L. COTTRILL, ERIC B. THOMPSON, WILIAM E. KELLAR, LORI BETH HIRSBERG, GERALDINE C. MCALISTER, SHIRLEY BEACHLER, TRUSTEE, STEPHEN MATTHEW WILFONG AND WIFE LISA MAYO WILFONG, HELEN M. WHITE, LISA L. AYERS AND HUSBAND, CHARLES W. AYERS, AND DAVID LEE EDWARDS, DEFENDANTS

No. COA18-361

Filed 15 January 2019

1. Deeds—restrictive covenants—subdivision of lots—general scheme of development

The trial court did not err by determining that a general plan of development existed for a tract of land for which a plat map was recorded. Of seven properties on the original map, lots 1-5 were divided for sale, lot 6 was the home of the landowner, who had recorded the map; and lot 7 was a larger tract of undeveloped land. Lots 1-5 were subject to identical restrictive covenants prohibiting further subdivision, while lots 6 and 7 were not initially subject to restrictive covenants. Lot 7 was later sold as three smaller parcels with the same restrictive covenants as lots 1 through 5.

2. Deeds—restrictive covenants—abandonment of intent

In an action involving restrictive covenants on the first five of seven lots, any intent to develop pursuant to a general plan was not abandoned. Although lot 7 was later sold as three smaller parcels, those parcels were all conveyed with the same restrictive covenants as lots 1 through 5. And, although the owner of lot 1 engaged in a land swap with a neighbor so that the neighbor could build a driveway, the trial court correctly determined that the land swap did not effect any substantial change in the character of the neighborhood and did not therefore render the covenants unenforceable.

3. Deeds—restrictive covenants—waiver of right to enforce

Defendants did not waive their rights to enforce restrictive covenants where two of the seven lots were not subject to the covenants originally and the owner of a lot subject to the "no subdividing" covenants engaged in a land swap with a neighbor so that the neighbor could build a driveway. As for the two lots not subject to restrictions at the time the map was recorded, defendants could not waive a right they did not possess. The long strip of land that was swapped with

a neighbor did not constitute a change so radical as to effectively destroy the essential purposes of the general development scheme.

Appeal by plaintiff from order entered 8 November 2017 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2018.

Law Office of Kenneth T. Davies, P.C., by Kenneth T. Davies and G. Brian Ernst, for plaintiff-appellant.

Alexander Ricks PLLC, by Louis G. Spencer and Ryan P. Hoffman, for defendants-appellees.

DAVIS, Judge.

In this appeal, we consider the circumstances under which (1) restrictive covenants demonstrate a common scheme of development within a residential subdivision; (2) changes to the character of a covenanted area can render otherwise valid restrictive covenants unenforceable; and (3) the right to enforce a restrictive covenant is waived by a failure to object to prior violations. Elford C. Dill brought this action seeking a declaratory judgment that restrictive covenants prohibiting the subdivision of certain lots in the neighborhood where he lived were unenforceable. The trial court entered an order concluding that the restrictive covenants at issue remain enforceable. We affirm.

Factual and Procedural Background

In 1945, Katherine Melton and her husband Guyton Melton acquired a 12.95-acre tract of land in Mecklenburg County. On 3 September 1953, Mrs. Melton recorded a plat map ("the Melton Map") entitled "Property of Mrs. Guy Melton" with the Mecklenburg County Register of Deeds that divided the land into seven separate lots numbered 1-7 (the "Melton Map Properties"). Lots 1-5 were subdivided for sale, Lot 6 contained Mrs. Melton's home, and Lot 7 consisted of a larger tract of undeveloped land.

Over the next three years, Mrs. Melton sold Lots 1-5. All five of the lots were purchased subject to identical restrictive covenants stating that "[n]o subdivision shall be made of the herein conveyed lot." On 22 March 1963, Mrs. Melton sold Lot 6. This sale was not subject to any restrictive covenants. Lot 7, which was not encumbered by any restrictive covenants prohibiting subdivision at the time the Melton Map was recorded, was later divided by Mrs. Melton into three separate parcels for sale. Between 1960 and 1964, these parcels were conveyed subject

to the same restrictive covenants prohibiting subdivision as those applicable to Lots 1-5.

On 5 May 1977, the owners of Lot 1 conveyed a small portion of the lot consisting of .199 acres to the owner of an adjoining lot that was not depicted on the original Melton Map. That same day, the owners of the adjoining lot conveyed .046 acres of their property to the owners of Lot 1. The purpose of this exchange of land (the "Lot 1 Land Swap") was to provide the owners of the adjacent lot with sufficient land upon which to build a driveway. On 3 December 1993, Dill purchased a tract of land that encompassed the majority of Lot 1 and the entirety of Lot 2.

Lot 6 was acquired by real estate developer K.V. Partners on 10 November 1999. K.V. Partners subsequently recorded a plat map with the Mecklenburg County Register of Deeds entitled "Bella Brown Preserve" in 2002. This map subdivided Lot 6 into three parcels that were subsequently purchased for residential use.

On 24 June 2016, Dill filed a civil action in Mecklenburg County Superior Court against all of the other owners of lots contained on the Melton Map. The named defendants were Gerard G. Loiseau, Jennifer O. Loiseau, April B. Cottrill, Shannon L. Cottrill, Eric B. Thompson, William E. Kellar, Lori Beth Hirsberg, Geraldine C. McAlister, Shirley Beachler, Stephen Matthew Wilfong, Lisa Mayo Wilfong, Helen M. White, Lisa L. Ayers, Charles W. Ayers, and David Lee Edwards (collectively "Defendants").[1] In his complaint, Dill sought a declaratory judgment that the restrictive covenants prohibiting subdivision contained in the deeds to Lots 1-5 were invalid and unenforceable. Specifically, he alleged that (1) Mrs. Melton "failed to establish any uniform scheme of development[;]" (2) a "substantial change in usage" had occurred since the creation of the restrictive covenants; and (3) Defendants had waived their right to enforce the covenants.

A bench trial was held beginning on 6 June 2017 before the Honorable Forrest D. Bridges. On 8 November 2017, the trial court entered a declaratory judgment in favor of Defendants "declaring that the subdivision restrictions . . . present in the chain of title for Lots 1 and 2 of the Melton Subdivision are consistent with a common scheme of development, and therefore, these restrictive covenants are valid and enforceable[.]" Dill filed a timely notice of appeal on 5 December 2017.

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1. Dill later voluntarily dismissed his claims against Lisa Ayers, Charles Ayers, Helen White, and Eric Thompson.

Analysis

On appeal, Dill argues that (1) "the restrictive covenants pertaining to the Melton Properties failed to evidence a common or general scheme of development;" (2) even assuming a general plan of development existed at some point, it was later abandoned by Mrs. Melton; and (3) Defendants are estopped from enforcing the restrictive covenants against Dill by virtue of their failure to object to prior violations of the covenants. We address each argument in turn.

I. General Plan of Development

[1] Dill first contends that the restrictive covenants prohibiting subdivision imposed upon the Melton Map Properties failed to establish a common plan of development. As a result, he asserts, they do not run with the land and may not be enforced against him by Defendants. We disagree.

It is well established that where "an owner of a tract of land subdivides it and conveys distinct parcels to separate grantees, imposing common restrictions upon the use of each parcel pursuant to a general plan of development, the restrictions may be enforced by any grantee against any other grantee." *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 665, 268 S.E.2d 494, 497 (1980). Restrictions imposed "under a general plan of development may be enforced against subsequent purchasers of the land who take with notice of the restriction. The test for determining whether a general plan of development exists is whether substantially common restrictions apply to all similarly situated lots." *Medearis v. Trs. Of Myers Park Baptist Church*, 148 N.C. App. 1, 5-6, 558 S.E.2d 199, 203 (2001) (citation omitted), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002).

Our appellate courts have held that restrictions need not be imposed upon every lot in a subdivision in order to demonstrate a general scheme of development. However, a general development scheme will not be recognized where a substantial proportion of lots lack similar restrictive covenants. *Compare Franklin v. Elizabeth Realty Co.*, 202 N.C. 212, 217, 162 S.E. 199, 201 (1932) (holding omission of restriction from single lot in subdivision did not destroy general plan of development), *with Sedberry v. Parsons*, 232 N.C. 707, 711-12, 62 S.E.2d 88, 91 (1950) (concluding no general plan of development existed where only 11 out of 21 lots contained similar restrictions).

In *Rice v. Coholan*, 205 N.C. App. 103, 695 S.E.2d 484, *disc. review denied*, 364 N.C. 435, 702 S.E.2d 303 (2010), this Court determined that

a general plan of development existed where 14 out of 18 total lots in a subdivision "contained the same or similar restrictions, while the deeds to four lots were not similarly restricted." *Id.* at 113, 695 S.E.2d at 491. In *Rice*, the four lots that were not subject to similar restrictive covenants were those retained by the family that initially owned the entire acreage that formed the basis for the subdivision. *Id.* We concluded that "there are substantially common restrictions applicable to all lots of like character" and that "there was a general plan of development for the lots in Jefferson Park[.]" *Id.* at 114, 695 S.E.2d at 492.

In the present case, the Melton Map was recorded in 1953 and consisted of seven lots in total. Lots 1-5 were all conveyed between 1953 and 1956 and were each subject to identical restrictive covenants prohibiting subdivision. Lot 6, which contained Mrs. Melton's home, was not subject to any restrictive covenants either at the time the Melton Map was recorded or when Mrs. Melton sold the property in 1963. Lot 7, which consisted of a large undeveloped tract of land, was similarly unencumbered by covenants at the time Lots 1-5 were conveyed. However, Lot 7 was later subdivided into three small parcels and sold between 1960 and 1964 subject to the same restrictions prohibiting subdivision as Lots 1-5.

We believe our decision in *Rice* controls the determination of this issue in the present case. There, as discussed above, a general plan of development was found to exist where 14 out of 18 total lots in a subdivision contained "substantially common restrictions." *Id.* Notably, the four unrestricted lots remained in the possession of the family that owned the land prior to the creation of the subdivision. Similarly, here Lots 1-5 were all conveyed by Mrs. Melton subject to identical restrictive covenants prohibiting subdivision. As in *Rice*, Mrs. Melton retained ownership of the lots that were not initially subject to any restrictive covenants. Furthermore, when Lot 7 was later sold as three smaller parcels, those parcels were all conveyed subject to the same restrictive covenant prohibiting subdivision as Lots 1-5.

Thus, we are satisfied that the trial court did not err in determining that a general plan of development existed for the Melton Map Properties. Accordingly, Dill's argument to the contrary is overruled.

II. Abandonment of Intent

[2] Dill next argues "[e]ven assuming *arguendo* that Mrs. Melton intended to develop pursuant to a general plan, she abandoned this intent by taking actions inconsistent with any such plan." As a result, he contends, the restrictive covenants affecting the Melton Map Properties

are no longer enforceable. In support of this proposition, he directs our attention to the Lot 1 Land Swap and the fact that Lots 6 and 7 were subsequently subdivided following the sale of Lots 1-5.

This Court has held that otherwise valid restrictive covenants may "be terminated when changes within the covenanted area are so radical as practically to destroy the essential objects and purposes of the agreement." *Medearis*, 148 N.C. App. at 6, 558 S.E.2d at 203 (citation and quotation marks omitted).

> Where a residential subdivision is laid out according to a general scheme or plan and all the lots sold or retained therein are subject to restrictive covenants, and the value of such development to a large extent rests upon the assurance given purchasers that they may rely upon the fact that the privacy of their homes will not be invaded by the encroachment of business, and that the essential residential nature of the property will not be destroyed, the courts will enforce the restrictions and will not permit them to be destroyed by slight departures from the original plan.
>
> On the other hand, when there is a general scheme for the benefit of the purchasers in a development, and then, either by permission or acquiescence, or by a long chain of violations, the property becomes so substantially changed that the whole character of the subdivision has been altered so that the whole objective for which the restrictive covenants were originally entered into must be considered at an end, then the courts will not enforce such restrictive covenants.

Logan v. Sprinkle, 256 N.C. 41, 47, 123 S.E.2d 209, 213 (1961) (internal citations omitted). Our Supreme Court has stated that "[w]hether the growth and general development of an area represents such a substantial departure from the purposes of its original plan as equitably to warrant removal of restrictions formerly imposed is a matter to be decided in light of the specific circumstances of each case." *Hawthorne*, 300 N.C. at 667, 268 S.E.2d at 499.

It is well established that violations of restrictive covenants must be substantial in order to constitute the type of radical change sufficient to render the covenants unenforceable. For example, in *Hawthorne* a public library was constructed and a branch bank office opened within a subdivision in violation of a covenant restricting the property

to residential uses. *Id.* at 668, 268 S.E.2d at 499. Our Supreme Court held that these violations did not constitute a radical change, concluding that "the library and the . . . bank office represent no more than minor intrusions upon the quiet enjoyment of an area otherwise residential in nature." *Id.* at 668-69, 268 S.E.2d at 500; *see also Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 39-40, 120 S.E.2d 817, 828 (1961) (use of six lots in a residential subdivision as parking space for an office building was not "such a radical or fundamental change or substantial subversion as practically to destroy the essential objects and purposes of the restriction agreement"); *Williamson v. Pope*, 60 N.C. App. 539, 544, 299 S.E.2d 661, 664 (1983) (residential covenant remained enforceable despite fact that 11 out of 69 blocks were used for commercial purposes).

Conversely, in *Medearis* this Court held that a radical change had, in fact, rendered a residential restriction unenforceable where six out of twelve lots were used for commercial purposes, four were vacant, and only one lot currently contained a residential structure. *Medearis*, 148 N.C. App. at 9, 558 S.E.2d at 205. In that case, we concluded that "the changes have destroyed the uniformity of the plan and the equal protection of the restriction." *Id.* (citation and quotation marks omitted).

In determining whether the Melton subdivision has undergone a radical change since the recordation of the Melton Map, we first examine the Lot 1 Land Swap. As noted above, the land swap was undertaken to provide the owners of property adjacent to Lot 1 with sufficient space to build a driveway. In its findings of fact, the trial court found that the parcel totaled .199 acres and "consisted of a long, thin strip of land that proceeds along Rosemary Lane to Sharon Hills Road. No structures have been constructed on the Lot 1 Land Swap property."

Thus, although the Lot 1 Land Swap constituted a technical violation of the restriction against subdivision, it ultimately had little to no impact upon the character of the neighborhood. Accordingly, the trial court correctly determined that the Lot 1 Land Swap did not "have any substantial change upon the character of the subdivision[.]"

With regard to the subdivision of Lots 6 and 7, we observe that no restrictive covenants were ever placed upon Lot 6. Furthermore, while Lot 6 was ultimately subdivided into three smaller parcels, those parcels were intended for residential use. Although Lot 7 originally consisted of an unencumbered tract of undeveloped land, it was later divided by Mrs. Melton into three smaller residential lots. These lots were conveyed subject to restrictive covenants prohibiting their subdivision identical to those applicable to Lots 1-5.

Based upon our thorough review of the record and applicable case law from our appellate courts, we are unable to agree with Dill's contention that the subdivision of these lots constituted a change radical enough "as practically to destroy the essential objects and purposes of the scheme of development." *Williams v. Paley*, 114 N.C. App. 571, 578, 442 S.E.2d 558, 562 (1994) (citation and quotation marks omitted). If anything, these changes arguably served to reinforce the original purpose of Melton's scheme of development. We hold that the trial court did not err in determining the actions relied upon by Dill did not have the effect of invalidating the covenants at issue.

III. Waiver of Right to Enforce Covenants

[3] In his final argument, Dill contends that Defendants have waived their right to enforce the subdivision restriction against him by their failure to object to "numerous prior subdivisions within the Melton Properties." Once again, he cites the Lot 1 Land Swap and the subdivisions of Lots 6 and 7 as support for this argument.

"A waiver may be express or implied." *Medearis*, 148 N.C. App. at 11, 588 S.E.2d at 206 (citation omitted). A waiver is implied "when a person dispenses with a right by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." *Id.* at 12, 588 S.E.2d at 206-07 (citation and quotation marks omitted). This Court has held that "[a]n acquiescence in a violation of restrictive covenants does not amount to a waiver of the right to enforce the restrictions unless changed conditions within the covenanted area are so radical as practically to destroy the essential objects and purposes of the scheme of development." *Williams*, 114 N.C. App. at 578, 442 S.E.2d at 562 (citation and quotation marks omitted).

As an initial matter, we observe that neither Lot 6 nor Lot 7 was subject to a restriction against subdivision at the time of the recordation of the Melton Map. Thus, Defendants could not have waived their right to object to the subdivision of Lots 6 and 7 because they never possessed such a right in the first place. Moreover, our conclusion that the Lot 1 Land Swap did not constitute a change so radical as to effectively destroy the essential purposes of the development scheme applies with equal force to Dill's waiver argument. *See Williamson*, 60 N.C. App. at 544, 299 S.E.2d at 664 (holding that failure to object to minor violation of restrictive covenant did not waive "right to enforce the covenant against . . . a much more radical departure from the permitted use"). Accordingly, we conclude the trial court did not err in ruling that Dill has

failed to show Defendants waived their right to enforce the subdivision restrictions against him.[2]

Conclusion

For the reasons stated above, we affirm the trial court's 8 November 2017 order.

AFFIRMED.

Judges HUNTER, JR. and MURPHY concur.

IN THE MATTER OF E.M.

No. COA18-685

Filed 15 January 2019

Juveniles—delinquency—evidence of mental illness—statutory mandate—referral to area mental health services director

In a juvenile delinquency action, the trial court erred by failing to refer the juvenile to the area mental health services director as required by N.C.G.S. § 7B-2502(c) before entering the disposition, where substantial evidence was presented that the juvenile had mental health issues.

Appeal by juvenile from order entered 30 January 2018 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 13 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Marie H. Evitt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for juvenile.

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2. Dill also argues that the trial court's 8 November 2017 order contained several findings of fact that were unsupported by evidence of record. Based on our careful review of the record, we are satisfied that even assuming *arguendo* portions of the court's findings were erroneous, any such error was harmless. *See In re E.M.*, __ N.C. App. __, __, 790 S.E.2d 863, 869 (2016) ("[T]he inclusion of an erroneous finding of fact is not reversible error where the court's other factual findings support its determination." (citation omitted)).

ZACHARY, Judge.

Evan Miller[1] appeals from an order committing him to placement in a youth development center and transferring his legal custody to the Mecklenburg County Department of Social Services, Youth and Family Services Division. The trial court was presented with evidence that Evan was mentally ill and failed to refer him to the area mental health services director for appropriate action as prescribed by statute. As a result, we vacate the trial court's order and remand for further action.

Background

On 20 July 2017, the State filed petitions against Evan Miller for common-law robbery and being an undisciplined juvenile. The State filed two more petitions against Evan on 6 September 2017 alleging common-law robbery and conspiracy to commit common-law robbery. Evan admitted to the offense of conspiracy to commit common-law robbery in exchange for dismissal of all other charges at a delinquency hearing on 23 October 2017 in Mecklenburg County District Court before the Honorable David H. Strickland. Judge Strickland entered a Level 2 disposition and placed Evan on probation for 12 months. The conditions of Evan's probation were to: (1) "Remain on good behavior and not violate any . . . law"; (2) "Not violate any reasonable and lawful rules of the juvenile's parent, guardian, or custodian"; and (3) "Attend school each and every day, all classes, not have any unexcused tardies, and not be suspended or excluded from school."

A motion for hearing was filed on 14 November 2017 alleging that Evan violated his probation by being suspended from school, together with leaving his home without permission and being away for up to three days. The motion for review was continued until January 2018. The Honorable Louis A. Trosch heard the motion for review on 26 January 2018. At the hearing, Evan admitted the probation violations. That same day, Judge Trosch entered a Level 3 disposition and committed Evan to a Youth Development Center for a minimum period of six months, and continuing until his eighteenth birthday at the maximum. Judge Trosch also ordered that the Mecklenburg County Department of Social Services, Youth and Family Services Division assume custody of Evan. Evan filed timely notice of appeal on 2 February 2018.

1. We use a pseudonym to protect the identity of the minor involved in this case.

Discussion

Evan argues on appeal that the trial court erred by: (1) entering a disposition against Evan without referring him to the area mental health services director for appropriate action after being presented with evidence that Evan was mentally ill; (2) making a finding that Evan had been involved in criminal activity while on probation when no competent evidence supported that finding; and (3) transferring Evan's legal custody to the Department of Social Services. After review, we conclude that the trial court failed to refer Evan to the area mental health services director, as prescribed by statute, after being presented with evidence that Evan was mentally ill.

The Juvenile Code governs management of cases involving undisciplined and delinquent juveniles. *See* N.C. Gen. Stat. §§ 7B-1500 to 7B-2706 (2017). The purpose of these procedures is to, *inter alia*, "deter delinquency and crime, including patterns of repeat offending . . . [b]y providing appropriate rehabilitative services to juveniles." *Id.* § 7B-1500(2)(b). Disposition of cases involving juveniles should "[p]rovide the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community." *Id.* § 7B-2500(3). When a juvenile comes before a trial court, "the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert *as may be needed* for the court to determine the needs of the juvenile." *Id.* § 7B-2502(a) (emphasis added). However, when evidence of mental health issues arise, the authority to order the evaluation of a juvenile by certain medical professionals is no longer discretionary, but is required:

> If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court *shall* refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. . . . The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs.

Id. § 7B-2502(c) (emphasis added).

The use of the word "shall" indicates a statutory mandate that the trial court refer the juvenile to the area mental health services director for appropriate action, and failure to do so is error. *See In re J.R.V.*, 212 N.C. App. 205, 208, 710 S.E.2d 411, 413 (2011) ("The use of the word

'shall' by our Legislature [is] . . . a mandate, and failure to comply with this mandate constitutes reversible error."), *disc. review improvidently allowed*, 365 N.C. 416, 720 S.E.2d 387 (2012). When a juvenile argues to this Court that the trial court failed to follow a statutory mandate, the error is preserved and is a question of law reviewed *de novo*. *In re G.C.*, 230 N.C. App. 511, 515-16, 750 S.E.2d 548, 551 (2013). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 516, 750 S.E.2d at 551.

In *In re Mosser*, 99 N.C. App. 523, 393 S.E.2d 308 (1990), a juvenile was committed to confinement despite evidence presented to the trial court that he was mentally ill. At the juvenile's dispositional hearing, the trial court heard evidence that "the juvenile had been diagnosed as manic-depressive and was being treated with the drug lithium," *id.* at 524, 393 S.E.2d at 309, and the trial court included that evidence in its findings of fact. *Id.* at 525, 393 S.E.2d at 310. The only basis for this evidence was "a statement made to the trial court by the mother of the juvenile." *Id.* at 528, 393 S.E.2d at 311. While this Court in *Mosser* was applying the former juvenile code, the statute in that case and the one in this case are substantially similar. *Compare* N.C. Gen. Stat. § 7A-647(3) (1989) ("If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is mentally retarded the judge shall refer him to the area mental health, mental retardation, and substance abuse director for appropriate action.") *with* N.C. Gen. Stat. § 7B-2502(c) (2017) ("If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court shall refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action."). The only difference between the two statutes is the elimination of the gender-specific term "him" and more appropriate language referring to those with mental disabilities. Thus, *Mosser*'s analysis and reasoning are applicable to this case. This Court held that "the record does not reflect a genuine inquiry into the nature of the needs of the juvenile," *Mosser*, 99 N.C. App. at 528, 393 S.E.2d at 311, and that the "evidence of mental illness compels further inquiry by the trial court *prior to entry of any final disposition*." *Id.* (emphasis added). The trial court's failure to "gain the advice of a medical specialist . . . precludes commitment to the Division of Youth Services." *Id.* at 528, 393 S.E.2d at 311-12. As a result, this Court vacated the juvenile's commitment and remanded for another dispositional order. *Id.* at 529, 393 S.E.2d at 312.

Here, the record before the trial court revealed the following mental health issues with regard to Evan: 1) a Risk and Needs Assessment filed

19 October 2017 indicated that a facility holding Evan entertained the idea of having him involuntarily committed but decided against it and that Evan had received "a plethora of treatment services"; 2) a Risk and Needs Assessment filed 5 December 2017 stated that "[Evan] has been exposed to a number of services to address his mental health needs, development of appropriate social skills, [and] pro-social activities"; 3) a Risk and Needs Assessment filed 25 January 2018 advised that Evan's behavior indicated "a need for additional mental health . . . treatment"; and 4) a Clinical Disposition Report prepared by a specialist hired by Evan's counsel asserted that Evan was "having major behavioral issues" and had been diagnosed with Conduct Disorder, Attention Deficit Disorder, Unspecified Depressive Disorder, and Cannabis Use Disorder.

At the hearing on the motion for review, substantial evidence was presented to the trial court establishing Evan's mental health issues. Evan's adoptive father testified that Evan had been "discharged from intensive therapy," and has "been in five different clinical homes. He's had therapists, outpatient, inpatient, [and] intensive in-home" services. Evan's attorney noted that "behavioral health and mental health services" were offered to Evan and that "his trauma [had] not [been] adequately treated." Evan's counsel also stated, "he has had a lot of treatment options at this point, but they just haven't worked." Even the trial court acknowledged that Evan had been to "twelve different mental facilities," and contemplated ordering the Youth Development Center to provide mental health services to Evan.

The trial court was presented with a plethora of evidence demonstrating that Evan was mentally ill—much more evidence than was presented in *Mosser*. Faced with any amount of evidence that a juvenile is mentally ill, a trial court has a statutory duty to "refer the juvenile to the area mental health . . . services director for appropriate action." N.C. Gen. Stat. § 7B-2502(c). It is possible that the trial court was under the misapprehension that such a referral was unnecessary, because Evan had already received significant mental health services prior to this disposition and because the trial court recognized that it could order mental health services for Evan during his commitment. However, the statute envisions the area mental health services director's involvement in the juvenile's disposition and "responsib[ility] for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs." *Id.* That did not happen in this case, and the area director was unable to participate in crafting an appropriate disposition for Evan. Therefore, we vacate Evan's disposition and remand for a new dispositional hearing, and do not address his second and third assignments of error.

Conclusion

The trial court failed to refer Evan to the area mental health services director after being presented with evidence that Evan was mentally ill, as required by statute. Accordingly, we vacate Evan's disposition and remand for a new hearing that includes a referral to the area mental health services director. Evan's custody shall remain with the Department of Social Services.

VACATED AND REMANDED.

Judges BRYANT and DILLON concur.

IN THE MATTER OF I.R.L.

No. COA18-427

Filed 15 January 2019

1. Termination of Parental Rights—abandonment—willfulness—findings not sufficient

The trial court erred in a termination of parental rights proceeding based on abandonment where the trial court did not address willfulness. The child was three years old and any communication with her, gifts to her, or requests to visit would have been directed to the mother, but there was a domestic violence prevention order (DVPO) that specifically prohibited the father from harassing the mother and required him to stay away from her. The DVPO effectively kept the father from visiting or trying to visit the child.

2. Termination of Parental Rights—failure to pay child support—findings

The trial court erred in a termination of parental rights proceeding by concluding that the father was subject to termination based on willful failure to pay child support. The termination order did not have findings indicating that a child support order existed or that the father failed to pay support as required by the child support order.

3. Termination of Parental Rights—grounds—notice

The trial court could not terminate a father's parental rights based on failure to pay support where the mother did not allege a "willful" failure to pay as required by a support or custody agreement.

The mother's bare allegation that the father failed to provide substantial financial care or consistent care was insufficient to put the father on notice of the specific statutory ground for termination.

Appeal by Respondent-Father from order entered 12 February 2018 by Judge Herbert Richardson in Robeson County District Court. Heard in the Court of Appeals 6 December 2018.

Jennifer A. Clay for Petitioner-Appellee Mother.

Richard Croutharmel for Respondent-Appellant Father.

DILLON, Judge.

This appeal arises from a termination of parental rights action between two parents. Respondent-father ("Father") appeals from the trial court's order terminating his parental rights to the minor child, I.R.L. ("Ivey").[1] We hold that Father did not receive sufficient notice that his parental rights were subject to termination and that the trial court failed to make sufficient findings of fact and conclusions of law regarding the willfulness of Father's conduct. Therefore, we reverse and remand to the trial court.

I. Background

Petitioner-mother ("Mother") and Father were in a relationship, but not married, when Ivey was born in February 2014. The parties lived together from January 2015 until 31 March 2015, when Father forced Mother to leave the home with Ivey. Mother has had sole custody of Ivey since her birth.

In April 2016, Mother obtained a domestic violence protective order ("DVPO") against Father. According to the DVPO, on 18 March 2016, Father went to Mother's home late at night unannounced, banged on her door, and threatened to kill her. Father assaulted Mother by hitting and choking her. The DVPO was in effect for one year, until April 2017. The DVPO ordered Father not to have any contact with Mother, but did not forbid contact with any minor children residing with her.

In March 2017, one month before the DVPO was set to expire, Father filed a pro se civil complaint for visitation with Ivey. That same day, Mother filed a petition to terminate Father's parental rights to Ivey

1. A pseudonym is used to protect the juvenile's privacy and for ease of reading.

alleging the grounds of failure to establish paternity, failure to pay support, and abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(5), (4), and (7) (2017). Mother alleged Father had not contacted or seen Ivey since March 2015 and had not paid any financial support.

In February 2018, following a hearing on the matter, the trial court entered an order terminating Father's parental rights to Ivey, concluding that Father had failed to pay child support and had abandoned Ivey and that termination of Father's parental rights was in Ivey's best interests. Father timely appealed.

II. Standard of Review

We review a trial court's termination of parental rights "to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re C.J.H.*, 240 N.C. App. 489, 497, 772 S.E.2d 82, 88 (2015). When the trial court's findings of fact "are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). We review the trial court's conclusions of law *de novo*. *See In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (citation omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

III. Analysis

On appeal, Father argues that the trial court erred in two ways: (1) in concluding that his actions, or lack thereof, amounted to abandonment of Ivey, and (2) in concluding that his parental rights were subject to termination based on his alleged willful failure to pay child support.

A. Abandonment

[1] Father argues the trial court erred by concluding his parental rights were subject to termination based on the ground of abandonment. More specifically, Father argues that the evidence and findings failed to show his lack of contact was willful in order to support a finding that this ground existed. We agree.

A trial court may terminate parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C. Gen. Stat. § 7B-1111(a)(7) (2017). Abandonment is "a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997). "[I]f a parent

withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

Here, the relevant six month period is 20 September 2016 to 20 March 2017. The trial court made the following findings regarding the ground of abandonment:

> 6. That [Father] has not seen the child since March 31, 2015. That he has not visited the child or made any inquires to [Mother] about the child. [Father] has not provided any substantial financial support for the child.
>
> . . .
>
> 8. That [Father] never bought the child any birthday presents or acknowledged the child on [her] birthday.
>
> . . .
>
> 10. That [Father] has made no effort to visit the child even though he knew where the child was.
>
> . . .
>
> 13 That on April 22, 2016, [Mother] obtained a [DVPO] against [Father] for one year.
>
> 14. That [Father] filed for visitation on March 20, 2017 in file 17 CVD 721, Robeson County, North Carolina.

The court then concluded that grounds for termination existed in "[t]hat [Father] has not seen the child since March 31, 2015. That he has not visited the child or made any inquiries to [Mother] about the child. [Father] has not provided any substantial financial support for the child."

The trial court's order fails to address the willfulness of Father's conduct, a required element under N.C. Gen. Stat. § 7B-1111(a)(4) and (7). *In re D.R.B.*, 182 N.C. App. 733, 738, 643 S.E.2d 77, 80 (2007); *see also In re D.M.O.*, ___ N.C. App. ___, ___, 794 S.E.2d 858, 861 (2016) ("Because '[willful] intent is an integral part of abandonment and . . . is a question of fact to be determined from the evidence[,]' a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent."). The finding of willfulness was especially important given that the court found that during the entirety of the relevant six month period, Father was subject to a DVPO, in which he was ordered to stay away from and have no contact with Mother, who had custody of Ivey.

Because Ivey was only three years old, any communication with, gifts to, or requests to visit her would have necessarily been directed to Mother; but the DVPO specifically prohibited Father from harassing or interfering with Mother and required him to stay away from her home and workplace. The only way Father could establish a way to see Ivey or communicate with her, without the risk of violating the DVPO, was to obtain a custody order establishing his visitation rights. Father did file a complaint seeking visitation with Ivey in March 2017, before the DVPO expired. While the DVPO did not prevent Father from providing financial support to Ivey, it did effectively prevent him from visiting, or trying to visit, Ivey as contact or communication with Mother was prohibited.

Without a finding of willfulness, we conclude that the trial court failed to enter adequate findings of fact and conclusions of law to demonstrate that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) to terminate Father's parental rights. *See In re T.M.H.*, 186 N.C. App. 451, 455-56, 652 S.E.2d 1, 3 (vacating the trial court's termination order and remanding where the order did not contain a finding that the respondent's abandonment of the juvenile was willful), *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

B. Failure to Pay Child Support

[2] Father also argues that the trial court erred in concluding that his parental rights were subject to termination based on his willful failure to pay child support because the evidence and findings failed to support this ground. We agree.

A trial court may terminate a parent's parental rights when

> [o]ne parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, *as required by the decree or custody agreement*.

N.C. Gen. Stat. § 7B-1111(a)(4) (2017) (emphasis added). "In a termination action pursuant to [Section 7B-1111(a)(4) of our General Statutes], petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed." *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990).

Here, while both parties testified that a child support order was entered in December 2014 ordering father to pay $50.00 per month in child support, the trial court's termination order is devoid of any findings indicating that a child support order existed or that Father failed to pay support "as required by" the child support order. Accordingly, the trial court's findings are insufficient to support a conclusion that Father's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(4).

[3] Further, the trial court could not terminate Father's parental rights based on this ground because the petition was insufficient to put Father on notice that his parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(4). *See In re B.L.H.*, 190 N.C. App. 142, 147, 660 S.E.2d 255, 258, *aff'd per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008) ("[W]here a respondent lacks notice of a possible ground for termination, it is error for the trial court to conclude such a ground exists.").

In her petition to terminate Father's parental rights, Mother did not allege a "willful" failure to pay support as required by a support or custody agreement. Mother alleged only that Father "[h]as failed to provide substantial financial support or consistent care for the minor child[.]" The petition makes no reference to the specific statutory ground of N.C. Gen. Stat. § 7B-1111(a)(4) and the petition is entirely silent as to whether a judicial decree or support order required Father to pay for Ivey's care or support. The petition also fails to include any allegations asserting Father's failure to pay was willful.

An allegation that a parent failed "to provide financial support or consistent care" may be an assertion under the ground of abandonment. *See In re C.J.H.*, 240 N.C. App. at 504, 772 S.E.2d at 92 (affirming termination of the respondent-father's parental rights based on abandonment where the trial court found that "during the relevant six-month period, [the respondent-father] did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile"). Indeed, in its conclusion of law pertaining to the ground of abandonment, the trial court concluded that Father "has not provided any substantial financial support for the child." Thus, Mother's bare allegation in the petition that Father "failed to provide substantial financial support or consistent care" is insufficient to put Father on notice that his parental rights could be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(4), and this ground cannot serve as a basis to terminate Father's parental rights. Accordingly we reverse the portion of the trial court's order concluding this ground existed.

IV. Conclusion

We vacate the trial court's order and remand the matter to the trial court with instructions to make appropriate findings as to the willfulness of Father's conduct regarding abandonment. On remand, we leave to the discretion of the trial court whether to hear additional evidence. *In re T.M.H.*, 186 N.C. App. at 456, 652 S.E.2d at 3. We reverse the portion of the order concluding that grounds existed to terminate Father's parental rights based on his failure to pay support.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and BERGER concur.

BETTY BURDEN JACKSON, NANCY BURDEN ELLIOTT; JAMES BURDEN, REBECCA BURTON BELL, DARREN BURTON, CLARENCE BURTON, JR. AND JOHN BURDEN, PLAINTIFFS

v.

DON JOHNSON FORESTRY, INC. AND EAST CAROLINA TIMBER, LLC, AND NELLIE BURDEN WARD, ALBERT R. BURDEN, LEVY BURDEN, CLARENCE L. BURDEN AND BRENDA B. MILLER, OTHER GRANDCHILDREN DEFENDANTS,

AND

EAST CAROLINA TIMBER, LLC, THIRD-PARTY/COUNTERCLAIM PLAINTIFF,

v.

ESTATE OF WILLIAM F. BAZEMORE BY AND THROUGH ITS EXECUTORS, NELLIE WARD AND TARSHA DUDLEY, AND ESTATE OF FLORIDA BAZEMORE BY AND THROUGH ITS ADMINISTRATOR, MARIA JONES, THIRD-PARTY/COUNTERCLAIM DEFENDANTS.

No. COA18-354

Filed 15 January 2019

1. Estates—life tenancy—timber rights

This action involved the alleged unauthorized cutting of timber from land subject to a life estate where the fee simple owner bequeathed to the life tenant more timber rights than are normally held by a life tenant. Under the terms of the life estate, the deceased holder of the life estate had the unfettered right during her life tenancy to profit from any large tree (defined as 12 inches or more in diameter). Her right to the smaller trees during the life tenancy was limited to that of a life tenant.

2. Estates—life tenancy—timber rights—unauthorized cutting —remaindermen—standing

In a case involving a deceased life tenant, remaindermen, and timber rights, the grandchildren-remaindermen had standing to seek relief for damage caused by any unauthorized timber cutting on the property which occurred during the life tenancy. It is irrelevant whether the grandchildren-remaindermen's interest in the property was vested or contingent under the will. They did not bring suit until after the life tenant's death; contingent remaindermen may bring suit for damages after their interest vests, even for acts committed during the life tenancy.

3. Estates—life tenancy—timber harvesting—waste—no claim by remaindermen

Grandchildren-remaindermen had no claim for waste of their inheritance where rights to large trees (defined as 12 inches or more in diameter) had been expressly granted to the life tenant, even if some of those trees were cut without the life tenant's authorization, because any damages would have accrued to the life tenant.

4. Estates—life tenancy—timber rights—remaindermen

In a case involving a life tenant, remaindermen, and timber rights, the grandchildren-remaindermen were entitled to any damage from the cutting of trees less than 12 inches in diameter (small trees) where the fee simple holder (the grandfather) had expressly conveyed rights in large trees (more than 12 inches in diameter) to the life tenant. The life tenant's interest in the small trees was only that of a life tenant, as the fee simple holder had not granted her any additional rights to those trees in the will. There was no evidence that small trees were cut for any reason other than for profit, which is not permissible for a life tenant to enjoy.

5. Estates—remaindermen—cutting timber—third party liability

A timber buyer was liable to grandchildren-remaindermen for any damage caused by the cutting of trees less than 12 inches in diameter (small trees) where the remaindermen's interest in the small trees had vested. Even if a third party contracts with the life tenant to cut timber, the third party was still liable to the remaindermen if any cutting was unauthorized. However, this timber buyer was not liable for double damages pursuant to N.C.G.S. § 1-539.1, because the timber company was lawfully on the land.

6. Estates—life tenancy—timber sale—third party liability

The estates of a life tenant and her spouse, who had acted under her power of attorney, were liable to indemnify a timber buyer with whom they had contracted.

7. Estates—life tenancy—timber rights—unauthorized cutting

A timber broker was not liable to grandchildren-remaindermen as a matter of law where the timber broker relied on a power of attorney when contracting to harvest timber from land subject to a life estate while the life tenant was alive. There was no evidence of actionable negligence or bad faith by the broker, who acted reasonably and in good faith.

Appeal by Plaintiffs, appeal by Defendant East Carolina Timber, LLC, and appeal by Third-Party Defendant Estate of Florida Bazemore, all from judgment entered 9 November 2017 by Judge Wayland J. Sermons, Jr., in Bertie County Superior Court. Heard in the Court of Appeals 3 October 2018.

Hornthal, Riley, Ellis & Maland, LLP, by M. H. Hood Ellis and Casey L. Peaden, for the Plaintiff.

Yates, McLamb & Weyher, L.L.P., by Christopher J. Skinner and Denaa J. Griffin, for Defendant Don Johnson Forestry, Inc.

McAngus Goudelock & Courie, PLLC, by Elizabeth H. Overmann, and Ward and Smith, P.A., by E. Bradley Evans, for Defendant and Third-Party/Counterclaim Plaintiff East Carolina Timber, LLC.

Dixon & Thompson Law PLLC, by Paul Faison S. Winborne, for the Third-Party/Counterclaim Defendant Estate of Florida Bazemore.

DILLON, Judge.

This is an appeal and cross-appeal by a number of parties from a summary judgment order in this case involving alleged damages caused by the unauthorized cutting of timber from a certain tract of land.

I. Background

In 1982, Z. J. Burden died, bequeathing a large tract of land (the "Property") to his lineal descendants. Specifically, pursuant to Mr. Burden's will, Mr. Burden's five children, or the survivor(s) of them,

received a life estate in the Property; and the remainder interest was held by Mr. Burden's grandchildren *per stirpes* in fee simple absolute. That is, the Property would not pass in fee simple absolute to Mr. Burden's grandchildren until *all* of his children had died.

Mr. Burden's will also granted to his children, or the survivor(s) of them, during the life tenancy, the right to sell any timber growing on the Property that was at least twelve (12) inches in diameter for any reason they saw fit, without having to share the proceeds from the sale with the remaindermen-grandchildren.

In early 2014, Florida Bazemore was the sole surviving child of Mr. Burden and, therefore, was the sole owner of the life estate in the Property. After entering a nursing home, Mrs. Bazemore signed a General Power of Attorney, naming her husband, William Bazemore, and two others as her attorneys-in-fact.

Shortly thereafter, Mr. Bazemore entered into a broker's agreement with Defendant Don Johnson Forestry, Inc. (the "Broker"), to procure a buyer for the timber growing on the Property. The Property had not been timbered since the mid-1980s. The Broker procured an offer from Defendant East Carolina Timber, LLC, (the "Timber Buyer") to purchase the timber growing on the Property.

In March 2014, Mr. Bazemore signed an agreement to sell the timber growing on the Property to the Timber Buyer.

During the summer of 2014, the Timber Buyer cut a number of trees from the Property, paying $130,000; $122,000 of this money was paid to Mr. Bazemore, and the remainder was paid to the Broker for its brokerage commission.

In May 2015, Mr. Bazemore died. Two months later, in July 2015, Mrs. Bazemore died. Upon her death, the Property passed to Mr. Burden's grandchildren *per stirpes* in fee simple absolute.

In October 2015, several of Mr. Burden's grandchildren[1] (the "Grandchildren") commenced this action against the Broker and the Timber Buyer for cutting timber from the Property during Mrs. Bazemore's life tenancy. The Grandchildren sought double the value of the timber cut, pursuant to N.C. Gen. Stat. § 1-539.1.

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1. The remaining grandchildren were subsequently made parties, denominated in the caption as "Other Grandchildren Defendants."

The Broker and Timber Buyer each answered denying liability. And the Timber Buyer asserted a third-party complaint against the estates of Mr. and Mrs. Bazemore for indemnity.

In November 2017, after a hearing on summary judgment motions, the trial court entered a summary judgment order, which did three things: (1) it granted the Broker's motion for summary judgment, thereby dismissing the Grandchildren's claims against it; (2) it granted the Grandchildren's motion for summary judgment on their claims against the Timber Buyer, awarding $259,596 in damages; and (3) it granted the Timber Buyer's motion for summary judgment against Mr. and Mrs. Bazemore's estates for indemnity. Each part of the summary judgment order was timely appealed. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings.

II. Analysis

A. Mrs. Bazemore's Rights in the Trees During Her Life Tenancy

[1] Rights in a particular piece of property have been described as a "bundle of sticks"[2] or "bundle of rights,"[3] where various people/entities could own different rights in that property. These rights include the right to timber the property.

Mr. Burden, as the fee simple absolute titleholder, owned substantially all of the "sticks" or "rights" in the Property. When Mr. Burden died, he left some of the "sticks" to Mrs. Bazemore, as a life tenant, and other "sticks" to the Grandchildren, as remaindermen. Important to the present case are the sticks owned by Mrs. Bazemore and by the Grandchildren relating to the timber on the Property.

Mr. Burden bequeathed to Mrs. Bazemore a life estate, which carries with it some rights in the trees. Specifically, our Supreme Court has held that, absent some other express grant, a life tenant's right to cut timber from her land is limited. That is, a life tenant is allowed to "clear tillable land to be cultivated for the necessary support of [her] family," and she may "also cut and use timber appropriate for necessary fuel" or to build structures on the property. *Dorsey v. Moore*, 100 N.C. 41, 44, 6 S.E. 270, 271 (1888). Further, a life tenant is permitted to harvest and sell sufficient timber needed to maintain the property. *Fleming v. Sexton*, 172

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2. *See U.S. v. Craft*, 535 U.S. 274, 278 (2002); *Everett's Lake Corp. v. Dye*, ___ N.C. App. ___, ___ n.1, ___ S.E.2d ___, ___ n.1, 2018 WL 4996362 (2018).

3. *In re Greens of Pine Glen*, 356 N.C. 642, 651, 576 S.E.2d 316, 322 (2003).

N.C. 250, 257, 90 S.E. 247, 250 (1916). However, a life tenant commits waste if she cuts timber "merely for sale,–to sell the timber trees, and allow them to be cut down and manufactured into lumber for market[:]"

> It would take from the land that which is not incident to the life-estate, and the just enjoyment of it, consistently with the estate and rights of the remainder-man or reversioner. The law intends that the life-tenant shall enjoy his estate in such reasonable way as that the land shall pass to the reversioner, as nearly as practicable unimpaired as to its natural capacities, and the improvements upon it.

Moore, 100 N.C. at 44, 6 S.E. at 271 (citations omitted).[4]

Mr. Burden, however, bequeathed to Mrs. Bazemore more "sticks" in the timber than that normally held by a life tenant, as was his right as the fee simple owner. *See Fletcher v. Bray*, 201 N.C. 763, 767-68, 161 S.E. 383, 385-86 (1931). Specifically, in addition to bequeathing to Mrs. Bazemore the "sticks" in the timber normally reserved for a life tenant, Mr. Burden bequeathed to Mrs. Bazemore the *unfettered* right to cut and sell any tree with a diameter of twelve (12) inches or more (hereinafter the "Large Trees") during her life tenancy. This arrangement was similar to that in *Fletcher v. Bray*, where the fee simple owner bequeathed a life estate in certain property to his wife *and* the right to dispose of the trees thereon *for any reason* during her life tenancy, with the remainder to his nephews and nieces in fee simple. *Id.* Our Supreme Court held that this arrangement was lawful:

> The court holds the opinion that the standing timber was severed by the testator from the fee and the absolute dominion thereof given the wife, and such severance was designed for her benefit rather than for the benefit of [the remaindermen]. Therefore, [wife], upon the sale of the timber, was entitled to hold the proceeds in her own right as her own property [and had the right to bequeath the proceeds as she saw fit].

Id. at 768, 161 S.E. at 386.

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4. In an opinion written by Judge John Haywood in 1800, the Court of Conference, which was our State's appellate court prior to the establishment of our Supreme Court in 1818, defined waste by a life tenant as "an unnecessary cutting down and disposing of timber, or destruction thereof upon wood lands, where there is already sufficient cleared land for the [life tenant] to cultivate, and over and above what is necessary to be used for fuel, fences, plantation utensils and the like[.]" *Ballentine v. Poyner*, 3 N.C. 268, 269 (1800).

Therefore, Mrs. Bazemore had the unfettered right *during her life tenancy* to profit from any Large Tree, pursuant to Mr. Burden's will. However, her right to the smaller trees during her life tenancy was limited to that of a life tenant.

B. The Grandchildren's Right to Seek Relief as Remaindermen

[2] Where there is an unauthorized cutting of trees during a life tenancy, the remaindermen may seek relief. But the type of relief that a remainderman can seek depends on whether his interest is vested or contingent.

Our Supreme Court has held that a *vested* remainderman or reversioner "has his election either to bring trover for the value of the tree after it is cut, or an action [for trespass] on the case in the nature of waste, in which, besides the value of the tree considered as timber, he may recover damages for any injury to the inheritance which is consequent upon the destruction of the tree." *Burnett v. Thompson*, 51 N.C. 210, 213 (1858). Indeed, the right to bring an action for waste has been codified in Chapter 1, Article 42 of our General Statutes. *See* N.C. Gen. Stat. § 1-42 (2017).

However, the owner of a *contingent* future interest "cannot recover damages for waste already committed, [but] they are entitled to have their [contingent] interests protected from [future] threatened waste or destruction by injunctive relief." *Gordon v. Lowther*, 75 N.C. 193, 193 (1876); *see also Peterson v. Ferrell*, 127 N.C. 169, 170, 37 S.E. 189, 190 (1900) (holding that both vested and contingent remaindermen have the right to seek an injunction to protect against future waste); *Edens v. Foulks*, 2 N.C. App. 325, 331, 163 S.E.2d 51, 54 (1968) (stating that "[i]t is well settled in this State, as in other states, that a contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste").

In the present case, the Timber Buyer argues that the Grandchildren have no standing to sue *for damages* because they were mere contingent remaindermen when the trees were cut. We conclude, though, that it is irrelevant whether the Grandchildren's remaindermen interest in the Property was vested or contingent under Mr. Burden's will: They did not bring suit until after Mrs. Bazemore's death, after their interest became a vested fee simple interest. Though neither party cites a case on point on this issue, we conclude that once a contingent remainderman's interest vests, he may bring suit for damages, even for acts committed during the life tenancy. Indeed, in discussing the limited right of a contingent remainderman to seek only injunctive relief, our Supreme Court

stated that a contingent remainderman "could not maintain [an] action [for damages] *during the life of the first taker*." *Latham v. Roanoke R. & Lumber Co.*, 139 N.C. 9, 51 S.E. 780, 780 (1905) (emphasis added). Our Supreme Court reasoned that, during the life tenancy, it is impossible to know what, if any, damage any particular contingent remainderman will suffer or which remainderman will vest and actually will suffer the damage. *Id.* at 11-12, 51 S.E. at 780-81.[5] But once the life tenancy terminates, this concern goes away.[6]

Further, our General Assembly has provided that *any* remainderman whose interest has become a vested present interest may sue for damages for timber cut during the preceding life tenancy. N.C. Gen. Stat. § 1-537 (2017) ("Every heir may bring action for waste committed on lands . . . of his own inheritance, as well in the time of his ancestor as in his own.")

Therefore, we conclude that the Grandchildren do have standing to seek relief for damage caused by any unauthorized cutting of timber on the Property which occurred during Mrs. Bazemore's life tenancy.

C. The Large Trees

[3] The Grandchildren argue that they are entitled to damages for the trees which were cut, contending that the contract between Mr. Bazemore (purportedly signed on behalf of Mrs. Bazemore) and the Timber Buyer was not validly executed.

We conclude that the Grandchildren have no claim regarding the Large Trees. Even if the contract was not valid, any claim pertaining to the cutting of Large Trees which occurred during the life tenancy of Mrs. Bazemore belonged to Mrs. Bazemore alone, and now to her estate. That is, the Large Trees belonged to Mrs. Bazemore during the life tenancy

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5. Our holding on this issue is the rule in other jurisdictions as well. *See, e.g.*, *Fisher's Ex'r v. Haney*, 180 Ky. 257, 262, 202 S.W. 495, 497 (1918) (holding that though a contingent remainderman can only seek injunctive relief during the life tenancy, this limiting rule has no application once the remainderman becomes vested at the death of the life tenant); *In re Estate of Hemauer*, 135 Wis. 2d 542, 401 N.W.2d 27, 1986 Wisc. App. LEXIS 3973, *3 (1986) (holding "that the [contingent] remaindermen's cause of action for waste did not accrue until [the life tenant's] death because the remaindermen had no right to enforce prior to her death").

6. Neither party makes any argument that the Grandchildren's claims are time-barred, and it does not appear that they are. But we note that claims of a remainderman for waste committed during the life tenancy but brought after the death of the life tenant may be time-barred. *See, e.g.*, *McCarver v. Blythe*, 147 N.C. App. 496, 499, 555 S.E.2d 680, 683 (2001).

pursuant to the express grant in Mr. Burden's will, and they were cut during the life tenancy. Unlike typical remaindermen, because of Mr. Burden's express grant to Mrs. Bazemore (and the other life tenants), the Grandchildren had no rights in the Large Trees during the life tenancy, *see Fletcher*, 201 N.C. at 768, 161 S.E. at 386; and, therefore, they had no rights in the Large Trees which were severed from the Property during the life tenancy. Therefore, assuming that the Large Trees were cut without Mrs. Bazemore's authorization, it is Mrs. Bazemore who suffered. The Grandchildren can make no claim for waste of their inheritance since Mr. Burden had "severed" the Large Trees from the fee that they were entitled to inherit. *Id.* And they have no claim for trover, as the Large Trees, once cut, belonged to Mrs. Bazemore.

D. The Small Trees

[4] We conclude that the Grandchildren are entitled to any damage caused by the cutting of trees less than twelve (12) inches in diameter (hereinafter the "Small Trees") by the Timber Buyer. Mrs. Bazemore's interest in the Small Trees was only that of a life tenant, as Mr. Burden did not expressly grant her any additional rights in the Small Trees in his will. And there was no evidence offered at summary judgment suggesting that the Small Trees were cut for any reason other than for profit, which, as explained above, is not permissible for a life tenant to enjoy.

The Timber Buyer argues that it is entitled to summary judgment, in any event, because the Grandchildren failed to put on any evidence showing that any of the trees cut by the Timber Buyer were, in fact, Small Trees. However, we conclude that there was *enough* evidence presented to survive summary judgment on this point. Specifically, the contract with the Timber Buyer provided that the Property would be "clear cut," suggesting that *all* of the marketable trees on the Property would be cut, not just the Large Trees. Further, the evidence identifies the types of trees which were actually cut by the Timber Buyer, including trees used for "pulp" and "chip-in-saw," which are typically made from smaller trees, less than twelve (12) inches in diameter. It certainly would have been better if the Grandchildren had offered an affidavit of a witness who expressly stated that at least one Small Tree was cut. However, we conclude that the record was sufficient to create an issue of fact that at least one Small Tree was cut, and therefore sufficient to reach the jury on the question of damages.

E. Liability of Timber Buyer

[5] Our Supreme Court has held that a third party may be liable to a remainderman whose interest has vested for wrongfully cutting timber,

specifically, for trover (the value of the trees) or for "an action on the case in the nature of waste" (the damage to the land). *Burnett*, 51 N.C. at 213.

Our Supreme Court has held that even if the third party contracts with the life tenant to cut timber, the third party is still liable to the remaindermen if any cutting is unauthorized. *Dorsey*, 100 N.C. at 45, 6 S.E. at 272. That is, it is no excuse that the third party acted under a contract with the life tenant, where the life tenant, otherwise, had no right to have the timber cut:

> The judgment, it seems, is founded upon the supposition that the contract between the life-tenant in possession and the [third party], purporting to give them the right to cut and remove the timber, had the legal effect to exempt [the third party] from liability to the [remaindermen] on such account. *This was a misapprehension of the law applicable.*

Id. at 45-6, 6 S.E. at 272.

Therefore, we conclude that the Timber Buyer is liable to the Grandchildren for any damage caused by the cutting of the Small Trees.

But we further conclude that the Timber Buyer is not liable for double damages pursuant to N.C. Gen. Stat. § 1-539.1. Specifically, our Court has held that a third party is not liable for double damages under this statute if the third party was not trespassing on the land itself when the cutting occurred. *Matthews v. Brown*, 62 N.C. App. 559, 561, 303 S.E.2d 223, 225 (1983). In *Matthews*, a timber company had the contractual right to enter upon a tract of land and cut some trees, but the evidence demonstrated that the company cut more trees than it was authorized to cut. *Id.* at 560, 303 S.E.2d at 224. We held that the award of damages for the unauthorized cutting of trees was appropriate, but that the doubling of the award was not since the company was lawfully on the land. *Id.* at 561, 303 S.E.2d at 225 (holding that N.C. Gen. Stat. § 1-539.1 does not apply unless the defendant was a "trespasser to the land"). In the present case, the Timber Buyer was authorized by Mr. Bazemore, who was acting within his apparent authority as Mrs. Bazemore's agent, to enter the Property and was therefore not a trespasser.

F. Indemnity from the Estates of the Bazemores

[6] The trial court concluded that the estates of Mr. and Mrs. Bazemore are liable to indemnify the Timber Buyer, as a matter of law. We agree.

As to Mrs. Bazemore's liability, the third party may be entitled to indemnity from the life tenant with whom he contracted. N.C. Gen. Stat. § 1-539.1(c). And, here, we conclude that the evidence establishes, as a matter of law, that Mr. Bazemore was acting as Mrs. Bazemore's agent when he contracted with the Timber Buyer.

As to Mr. Bazemore's liability, our Supreme Court has held that "[a]n agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had actual knowledge of the agency and of the principal's identity." *Howell v. Smith*, 261 N.C. 256, 258-59, 134 S.E.2d 381, 383 (1964).

G. The Broker

[7] The Grandchildren argue that the Broker, with whom Mr. Bazemore contracted to procure a buyer, was liable to them for any unauthorized cutting.

The trial court held that the Broker was not liable, as a matter of law. We agree. Section 32A-40[7] of our General Statutes provides that a person who relies in good faith on a power of attorney is not responsible for the misapplication of property, even where the attorney-in-fact exceeds or improperly exercises his authority.

Here, there was no evidence of actionable negligence or bad faith on the part of the Broker in this case. The evidence shows that the Broker reasonably acted in good faith to ensure that Mr. Bazemore had the authority to sell the timber on the Property: Mr. Bazemore assured the Broker of his authority to sell all of the timber on the Property; the Broker spoke to the Bazemores' attorney to confirm Mr. Bazemore's authority to sell the timber; the Broker communicated with all of Mrs. Bazemore's attorneys-in-fact; and the Broker checked the tax card to ensure that Mrs. Bazemore was the record owner of the Property. We believe that it is too much to ask this Broker, who is not an attorney, to have reviewed Mr. Burden's will and to have done any more to understand the exact rights Mrs. Bazemore had in the trees on the Property.

III. Conclusion

As a matter of law, the Grandchildren are entitled to damages from the Timber Buyer for any Small Trees they are able to prove on remand were cut by the Timber Buyer, but not for double damages pursuant to N.C. Gen. Stat. § 1-539.1.

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7. N.C. Gen. Stat. § 32A-40 (2017) has since been recodified as N.C. Gen. Stat. § 32C-1-119(c), effective as of 1 January 2018.

As a matter of law, the Grandchildren are not entitled to any damages from the Timber Buyer for any Large Trees which were cut.

And since whether the Grandchildren are entitled to any damages is still to be determined on remand, it was error for the trial court to award costs to the Grandchildren in its summary judgment order. The trial court may consider whether an award of costs in favor of the Grandchildren would be appropriate at the appropriate time on remand.

The Grandchildren are not entitled to any damages from the Broker for any of the trees (whether Large or Small) which were cut, as a matter of law. And the trial court did not err in awarding the Broker its costs.

The estates of Mr. and Mrs. Bazemore are liable to Timber Buyer for indemnity for any liability of the Timber Buyer to the Grandchildren for damage caused by any wrongful cutting of the Small Trees, as a matter of law. And the trial court properly awarded costs to the Timber Buyer.

AFFIRMED IN PART, REVERSED IN PART, REMANDED IN PART.

Judges STROUD and BERGER concur.

MARLIN LEASING CORP., PLAINTIFF
v.
WALID ESSA, DEFENDANT

No. COA18-610

Filed 15 January 2019

Constitutional Law—Full Faith and Credit—out-of-state default judgment—service of process

In an action to recover damages for a default on an equipment lease contract, a default judgment entered against defendant in Pennsylvania was not entitled to full faith and credit in North Carolina where defendant was not properly served with process in accordance with Pennsylvania law.

Appeal by defendant from order entered 27 February 2018 by Judge Ned W. Mangum in Wake County District Court. Heard in the Court of Appeals 14 November 2018.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Byron L. Saintsing, for plaintiff-appellee.

Sharpless & Stavola, P.A., by Peter F. O'Connell and Eugene E. Lester, III, for defendant-appellant.

DAVIS, Judge.

The Full Faith and Credit Clause of the United States Constitution provides that a judgment entered in one state must be given the same effect in another state that it possesses in the state where it was rendered. A foreign judgment must, however, meet the criteria for a valid judgment under the laws of the rendering state — including the requirement of proper service of process upon the defendant — before it will be afforded full faith and credit.

Defendant Walid Essa appeals from an order in which the trial court found that a default judgment rendered against him in Pennsylvania was entitled to full faith and credit in North Carolina. Because we conclude that Essa was never properly served with process under Pennsylvania law and lacked a full and fair opportunity to litigate the action in Pennsylvania, we reverse.

Factual and Procedural Background

On 19 February 2011, Essa, who operates a restaurant called The Dugout in Archdale, North Carolina, entered into an equipment lease contract (the "Lease") with Trinity Data Systems ("Trinity"). The Lease provided that Trinity was to install a point-of-sale system at The Dugout. The terms and conditions of the Lease provided that it was to be governed by the laws of Pennsylvania, any lawsuit arising out of the Lease would be brought in Pennsylvania, and Essa would be subject to jurisdiction in Pennsylvania. Trinity subsequently assigned the Lease to Marlin Leasing Corporation ("Marlin").

On 18 April 2013, Marlin filed a complaint against Essa in municipal court in Philadelphia, Pennsylvania. In its complaint, Marlin alleged that Essa was in default under the Lease and claimed damages of $8,562.75. On 15 August 2014, Marlin filed with the municipal court a document captioned "Affidavit of Service by Mail" in which counsel for Marlin stated that (1) he "sent a certified letter (return receipt requested) to the defendant and the receipt was returned marked either 'UNCLAIMED' or 'REFUSED' "; (2) he then sent a letter by regular mail to Essa at the same address where the original certified letter had been mailed, which was

2104 Francis St., High Point, NC 27263 (the "High Point Address"); and (3) the letter was never returned to him despite the fact that his return address was listed thereon.[1] In fact, the letter sent by certified mail had been returned to Marlin with the notation that it had been "unclaimed."

A hearing was held in municipal court for which Essa was not present. A default judgment (the "Pennsylvania Judgment") was entered by the court on 3 September 2014. On 20 January 2015, Marlin filed a complaint in Wake County District Court in which it asserted that the Pennsylvania Judgment was entitled to full faith and credit in North Carolina and requested that the judgment be enforced. Essa filed an answer on 7 July 2017 in which he argued that the Pennsylvania Judgment was not entitled to full faith and credit due, in part, to the fact that Essa had not received notice of the Pennsylvania action.

On 3 January 2018, Marlin filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure along with a supporting affidavit from Karen Shields, Vice President and Deputy General Counsel for Marlin. The affidavit stated, in pertinent part, as follows:

> Service on the Defendant was made in accordance with 231 Pa. Code Rule 403(1) by mailing the documents by ordinary mail via U.S. Postal Service and by U.S. Postal Service, Certified Mail, Return Receipt Requested as evidenced by the Affidavit of Service. Defendant refused to accept service by certified mail sent to 2104 Francis Street, High Point, NC 27263 and therefore Plainitf [sic] mailed a copy of the Relisted Pennsylvania Suit to the same address which was not returned to Marlin by the U.S. Postal Service.[2]

Essa filed a cross-motion for summary judgment supported by his own affidavit on or about 5 January 2018. Essa's affidavit stated, in pertinent part, as follows:

> 4. I am the owner of The Dugout restaurant located at 11246 N. Main St., Archdale, NC 27263. . . .

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1. While it is not entirely clear from the affidavit, it appears that a copy of the complaint was included with the letter sent to Essa.

2. As discussed in more detail below, the assertion in this affidavit that the letter sent by certified mail had been "refused" was incorrect. Instead, the receipt for the letter had been marked "unclaimed."

> 5. The Dugout has been continuously located at the address stated in the preceding paragraph since prior to February 2011.
>
> 6. I was not served with a copy of a Summons and Complaint in the Commonwealth of Pennsylvania, Philadelphia Municipal Court, First Judicial District of Pennsylvania, Case No. SC-13-04-18-4746 (the "Pennsylvania Action").
>
> 7. I did not refuse service of a copy of a Summons and Complaint in the Pennsylvania Action.
>
> 8. Prior to the commencement of this civil action, I had no knowledge of the Pennsylvania Action.

A hearing was held on both motions in Wake County District Court on 22 February 2018 before the Honorable Ned W. Mangum. On 27 February 2018, the trial court issued an order granting Marlin's motion for summary judgment and denying Essa's cross-motion. In the order, the court stated that "the Plaintiff's Pennsylvania judgment against the Defendant is entitled to full faith and credit in the State of North Carolina and . . . the Defendant had a full and fair opportunity to litigate any issues regarding jurisdiction in the Commonwealth of Pennsylvania." Essa filed a timely notice of appeal with this Court.

Analysis

Essa contends that the trial court erred in granting summary judgment in favor of Marlin because the Pennsylvania Judgment is not entitled to full faith and credit in North Carolina in that it was entered despite the lack of valid service of process upon Essa. We agree.

"On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*." *Mitchell*, *Brewer*, *Richardson*, *Adams*, *Burge & Boughman v. Brewer*, __ N.C. App. __, __, 803 S.E.2d 433, 443 (2017) (citation and quotation marks omitted), *disc. review denied*, 370 N.C. 693, 811 S.E.2d (2018). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (citation and quotation marks omitted).

It is well established that "[t]he moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to

judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that "[a]n issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *In re Alessandrini*, 239 N.C. App. 313, 315, 769 S.E.2d 214, 216 (2015) (citation omitted).

This Court has recently summarized the effect of the Full Faith and Credit Clause:

> The Full Faith and Credit Clause requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered. Because a foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the foreign judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit.

Tropic Leisure Corp. v. Hailey, __ N.C. App. __, __, 796 S.E.2d 129, 131 (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 369 N.C. 754, 799 S.E.2d 868, *cert. denied*, __ U.S. __, 199 L. Ed. 2d 385 (2017). We review *de novo* the issue of whether a trial court has properly extended full faith and credit to a foreign judgment. *Id.*

"[T]he test for determining when the Full Faith and Credit Clause requires enforcement of a foreign judgment focuses on the validity and finality of the judgment in the rendering state." *DoxRx, Inc. v. EMI Servs. of N.C.*, 367 N.C. 371, 375, 758 S.E.2d 390, 393 (citation omitted), *cert. denied*, __ U.S. __, 190 L. Ed. 2d 390 (2014). Our Supreme Court has made clear that North Carolina courts will not enforce foreign judgments in circumstances where "the rendering state lacked personal or subject matter jurisdiction." *Id.* at 382, 758 S.E.2d at 397.[3]

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3. Improper service of process results in a lack of personal jurisdiction under both North Carolina and Pennsylvania law. *See Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998) ("[I]t is well established that a court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods."), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999); *Cintas Corp. v. Lee's Cleaning Servs.*, 549 Pa. 84, 91, 700 A.2d 915, 917 (1997) ("Service of process is a mechanism by which a court obtains jurisdiction over a defendant[.]").

In addressing this issue, we find instructive our Supreme Court's decision in *Boyles v. Boyles*, 308 N.C. 488, 302 S.E.2d 790 (1983), in which the Court determined that a default judgment rendered by a federal court applying Florida law was not entitled to full faith and credit because the defendant was not given proper notice of the action. *Id.* at 489, 302 S.E.2d at 792. *Boyles* concerned a claim to recover alimony arrearages by the plaintiff from her ex-husband. *Id.* The plaintiff attempted to serve the defendant by certified mail, which was returned "bear[ing] a postal stamp indicating . . . that the letter was 'unclaimed.' " *Id.* Subsequently, "two notices were left at [the defendant's] Pennsylvania address informing him that the post office had the letter." *Id.* A hearing was held in a Florida circuit court that the defendant did not attend. *Id.* The circuit court granted a default judgment in favor of the plaintiff, finding that service upon the defendant had been proper under Florida law. *Id.*

Ten years later, the plaintiff filed a complaint in Wake County Superior Court, "asking that full faith and credit be accorded to the Florida default judgment." *Id.* at 490, 302 S.E.2d at 792. The defendant, who had become a resident of North Carolina, argued that the default judgment was not entitled to full faith and credit because of insufficient notice with regard to the Florida action. *Id.* The defendant filed an affidavit in which he "specifically denied he was ever aware" of the Florida default judgment and stated that he had never "been served with a complaint for [the] alimony arrearages while living in Pennsylvania." *Id.*

In determining whether the default judgment was entitled to full faith and credit, our Supreme Court looked to Florida law governing service of process, which provided that notice sent by mail was sufficient "only if the affected party received actual notice or there was affirmative evidence that he or she had refused the notice." *Id.* at 496, 302 S.E.2d at 796. The Supreme Court concluded that the evidence of the plaintiff's attempts to serve the defendant (which included a receipt indicating that the letter had been "unclaimed" and notations that two notices had been left at the defendant's address) was not sufficient to support an inference that the defendant had actual notice "in light of [his] assertion that he was never aware of the Florida proceeding." *Id.* at 498, 302 S.E.2d at 797.

Although *Boyles* applied Florida law rather than Pennsylvania law, it is nevertheless helpful in guiding our analysis of the similar issue presented in the case currently before us. Like the defendant in *Boyles*, Essa argues the Pennsylvania municipal court that entered the default judgment lacked jurisdiction over him because he was not properly served under Pennsylvania law. He further asserts that he never received

notice of the Pennsylvania Judgment until the North Carolina lawsuit was filed by Marlin. Therefore, in order to analyze Essa's arguments we must first examine Pennsylvania law to determine whether he was properly served with process under the laws of that jurisdiction.

I. Service of Process under Pennsylvania Rules of Civil Procedure

As an initial matter, we note that the Pennsylvania Supreme Court has explained the jurisdictional significance of service of process as follows:

> Service of process is a mechanism by which a court obtains jurisdiction of a defendant, and therefore, the rules concerning service of process must be strictly followed. Without valid service, a court lacks personal jurisdiction of a defendant and is powerless to enter a judgment against him or her. Thus, improper service is not merely a procedural defect that can be ignored when a defendant subsequently learns of the action against him or her.

Cintas, 549 Pa. at 91, 700 A.2d at 917-18 (internal citations omitted). Thus, under Pennsylvania law, "[i]f there is no valid service of initial process, a subsequent judgment by default must be deemed defective." *U.K. LaSalle, Inc. v. Lawless*, 421 Pa. Super. 496, 500, 618 A.2d 447, 449 (1992).

Rule 404 of the Pennsylvania Rules of Civil Procedure governs service of process upon persons outside of Pennsylvania, stating that "[o]riginal process shall be served outside the Commonwealth within ninety days of the issuance of the writ or the filing of the complaint or the reissuance or the reinstatement thereof." Pa. R.C.P. No. 404. Rule 404 further provides that process may be served "by mail in the manner provided by Rule 403." Pa. R.C.P. No. 404(2). Rule 403, in turn, states as follows:

> If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent. Service is complete upon the delivery of the mail.
>
> (1) If the mail is returned with notation by postal authorities that the defendant *refused* to accept the mail, the plaintiff shall have the right of service by mailing a copy to the defendant at the same address by ordinary mail with the return address of the sender appearing thereon. Service by ordinary mail

> is complete if the mail is not returned to the sender within fifteen days of mailing.
>
> (2) If the mail is returned with notation by the postal authorities that it was *unclaimed*, the plaintiff shall make service by another means pursuant to these rules.

Pa. R.C.P. No. 403 (emphasis added).

Courts applying Pennsylvania law have consistently differentiated between the terms "refused" and "unclaimed" in this context. *See Kucher v. Fischer*, 167 F.R.D 397, 398 (E.D. Pa. 1996) (distinguishing between notations "refused" and "unclaimed" for purposes of Rule 403); *Carson v. Carson*, 28 Pa. D. & C.3d 281, 283 (1983) ("[I]t seems clear that 'unclaimed' is not the same as 'refused.' "); *Harris v. Kaulius*, 18 Pa. D. & C.3d 636, 639 (1981) ("[A] serious question of due process [will arise where a] plaintiff produce[s] nothing except proof that the letter [went] unclaimed[.]").

In *Kucher*, the plaintiff filed a complaint against the defendants in an effort to recover damages for injuries she received in a car accident. *Kucher*, 167 F.R.D. at 397. After the defendants failed to make an appearance, the plaintiff sought a default judgment in which she claimed that the defendants had been properly served with process under Pennsylvania law. *Id.* In support of this motion, the plaintiff asserted that (1) after a copy of the complaint was sent by certified mail to the defendants' address, it was returned to the plaintiff with the notation "unclaimed;" and (2) the plaintiff had subsequently sent additional copies of the complaint "by regular first class mail," which were not returned. *Id.* In denying the plaintiff's motion for a default judgment, the court applied Rule 403 as follows:

> Pennsylvania law authorizes service by ordinary mail upon satisfaction of the following steps: (1) the mailing of the original process to the defendant by a form of mail requiring a receipt, such as certified or registered mail; (2) the return of that mail impressed with a notation by the postal authorities that the mail had been "refused"; and (3) the re-mailing of the "refused" mail to the defendant by ordinary mail.
>
> Here, plaintiff has established that steps 1 and 3 have been fulfilled, i.e., that process was mailed to defendant initially by certified mail and later by ordinary mail. However, because the certified letters returned by the

> postal authorities contain notations impressed upon them indicating that the mail went "unclaimed" rather than that it was "refused," plaintiff has failed to demonstrate satisfaction of step 2.
>
> A notation by the postal authorities that certified or registered mail went "unclaimed" rather than "refused" is generally insufficient to satisfy the requirements of service by ordinary mail under Pennsylvania law. Similarly, certified or registered mail that is returned because the intended recipient has moved can not be said to have been deliberately refused.
>
> The importance of the distinction between "refused" and "unclaimed" mail reflects the common sense notion that a defendant's failure to claim mail may stem from a multitude of reasons, including that the defendant has moved to a new address. Unlike a refusal, which is intentional, a failure to claim does not alone give rise to the implication that the defendant has deliberately sought to avoid receipt of process.

Id. at 397-98 (internal citations and quotation marks omitted).

Like the plaintiff in *Kucher*, Marlin has failed to satisfy the second step under Rule 403. Despite the statement in the affidavit filed by Marlin asserting that the certified mail receipt sent to Essa came back bearing the notation "refused," the record before us makes unmistakably clear that the certified letter was instead returned with the notation "unclaimed." Thus, based on unambiguous Pennsylvania law, we conclude that Marlin failed to properly serve Essa under Rule 403.

Marlin contends, however, that even assuming service was improper under Rule 403, service was effectuated "pursuant to the controlling local rules of the Philadelphia Municipal Court, Civil Division, which rendered the judgment in the Pennsylvania Action." In support of this argument, Marlin cites Local Rule 111.C which states, in pertinent part, as follows:

> (1) A complaint may be served by certified mail if defendant's last known address is . . . outside the County of Philadelphia . . . .
>
> (2) If the certified mail is returned with notation by the postal authorities that it was *refused or unclaimed*, the plaintiff shall have the right of service by mailing a copy to the defendant at the same address by first class mail with

> the return address of sender appearing thereon. Service by ordinary mail is complete if the mail is not returned to sender within 15 days after mailing.

Phila. M.C.R. Civ.P. No. 111.C (emphasis added).

Thus, while Rule 403 materially differentiates between a notation of "unclaimed" on a certified mail receipt as opposed to a notation of "refused," no such distinction exists under Local Rule 111.C. Therefore, if — as Marlin argues — Local Rule 111.C applies on these facts, service upon Essa was proper under Pennsylvania law based on the fact that the letter Marlin subsequently sent to Essa by regular mail was not returned within fifteen days. Conversely, if Essa is correct that Rule 403 governs, then no proper service was made.

In resolving this conflict, we are guided by Pennsylvania Rule of Civil Procedure 239, which provides that "[l]ocal rules shall not be inconsistent with any general rule of the Supreme Court or any Act of Assembly." Pa. R.C.P. 239(b)(1). *See also Sanders v. Allegheny Hosp. – Parkview Div.*, 2003 PA Super 349, 833 A.2d 179, 183 (Pa. Super. 2003) ("Local courts have the power to formulate their own rules of practice and procedure. These rules have equal weight to those rules established by the Pennsylvania Supreme Court *provided that the local rules do not abridge, enlarge, or modify the substantive rights of a party*." (internal citation and quotation marks omitted, emphasis added)).

We believe that Local Rule 111.C is facially inconsistent with Rules 404 and 403 with regard to non-resident defendants such as Essa in that its application would diminish their rights to adequate service of process. As noted above, Rule 404 specifically cross-references Rule 403 and expressly states that with regard to defendants outside of Pennsylvania service pursuant to Rule 403 is appropriate. Pa. R.C.P. No. 404(2). Rule 403, in turn, provides that service may be made by regular mail *only* in cases where a letter previously sent by certified mail has been returned as "refused" and that, conversely, "if the mail is returned with notation by the postal authorities that it was unclaimed, the plaintiff shall make service by another means pursuant to *these* rules" — not pursuant to rules established by local courts. Pa. R.C.P. No. 403(1), (2) (emphasis added). *See In re Elfman*, 212 Pa. Super. 164, 167, 240 A.2d 395, 396 (Pa. Super. 1968) ("When notice in a specified manner is prescribed by a statute, that method is exclusive.").

Thus, whatever applicability Local Rule 111.C may have with regard to service upon local defendants, we are unable to agree with Marlin that it applies to non-resident defendants such as Essa. *See, e.g.*, *Baez v. Rivers*, 2007 Phila. Ct. Com. Pl. LEXIS 21, *6 (applying Rules 403 and

404 to service on out-of-state defendant).[4] Accordingly, we conclude that Essa was never properly served with process under Pennsylvania law.

II. Full and Fair Opportunity to Litigate

Finally, we address Marlin's argument that the Pennsylvania Judgment should be deemed enforceable in North Carolina even if service was not proper under Pennsylvania law on the theory that Essa nevertheless had a full and fair opportunity to litigate the service of process issue in Pennsylvania yet essentially waived that right.[5] However, as Marlin concedes, this principle would apply *only if* Essa had actually received notice of the Pennsylvania action in which the judgment sought to be enforced was rendered. *See Boyles*, 308 N.C. at 491-92, 302 S.E.2d at 793 (An inquiry into whether a "jurisdictional issue was 'fully and fairly litigated' . . . rests on the presupposition that the requirement of adequate notice had been met in the original proceeding. Indeed, if a litigant has no notice of a court proceeding, *a fortiori*, the litigant could not 'fully and fairly' litigate any issue in the case.").[6]

As noted above, Essa submitted an affidavit in support of his motion for summary judgment in which he stated that he was wholly unaware of the existence of the Pennsylvania action until he was served with process in the North Carolina action. Marlin makes several arguments in its brief as to why an inference can be drawn that Essa *may* have been aware of the Pennsylvania action prior to the entry of the Pennsylvania Judgment, but as Marlin's counsel conceded at oral argument nothing in the record affirmatively demonstrates that Essa possessed actual knowledge of the Pennsylvania lawsuit.

First, in support of its contention that Essa had actual notice of the Pennsylvania action Marlin has requested that we take judicial notice of a deed — a copy of which is attached to Marlin's brief — naming Essa

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4. While Marlin cites *Leight v. Lefkowitz*, 419 Pa. Super. 502, 615 A.2d 715 (Pa. Super. 1992), to support its argument that Pennsylvania courts do, in fact, apply Local Rule 111.C, its reliance on that case is misplaced. *Leight* involved Pennsylvania defendants rather than an out-of-state defendant such as Essa. *Id.* at 507, 615 A.2d 753. Therefore, we do not find *Leight* to be applicable to the present case.

5. This appears to be the ground underlying Judge Mangum's 27 February 2018 order granting summary judgment in favor of Marlin.

6. As noted above, Pennsylvania caselaw — while not entirely clear on the issue — seems to suggest that even actual notice is not enough to remedy the effects of improper service. *See U.K. LaSalle*, 421 Pa. Super. at 500, 618 A.2d at 449. In any event, for the reasons set out herein the question of whether actual notice could ever be sufficient under Pennsylvania law to excuse improper service is moot because Marlin has failed to rebut Essa's evidence that he *lacked* actual notice of the Pennsylvania Judgment until the North Carolina lawsuit was filed.

as the grantee of the property located at the High Point Address. It is true that "this Court can take judicial notice of certain documents even though they were not included in the record on appeal" and that we have previously taken judicial notice of information contained within recorded deeds. *In re Hackley*, 212 N.C. App. 596, 601-02, 713 S.E.2d 119, 123 (judicially noting a conveyance of property reflected on a recorded deed attached to a party's brief), *disc. review denied*, 365 N.C. 351, 718 S.E.2d 376 (2011). The mere fact, however, that Essa may own the property listed at the High Point Address is by itself insufficient to show that Essa had actual notice of the Pennsylvania Action. Thus, the existence of the deed — without more — is not sufficient to rebut Essa's sworn affidavit denying any prior knowledge of the Pennsylvania Action.

Second, Marlin contends that a 2 July 2013 entry on the docket sheet for the Pennsylvania Action raises an inference that Essa had actual notice of the Pennsylvania Action. This entry states that the "case was amended to add as [defendant] Walid Essa at 11246 N. Main St. Ste 304, Archdale, N.C. 27263" — the address of The Dugout. Although Marlin contends this docket entry suggests that a "Statement of Claim" in connection with the Pennsylvania Action was, in fact, mailed to The Dugout, the record before us contains no indication that any documents were actually mailed to that address. Therefore, it would be pure speculation for us to assume that Essa had actual notice of the Pennsylvania Action, and such conjecture is insufficient to rebut Essa's sworn statement to the contrary.

* * *

Thus, because Marlin failed to properly serve Essa with process under Pennsylvania law and has not shown that Essa had a full and fair opportunity to litigate in Pennsylvania the jurisdictional issue resulting from the lack of service, we hold that the trial court erred in granting summary judgment in favor of Marlin and in denying Essa's cross-motion. *See Boyles*, 308 N.C. at 497, 302 S.E.2d at 796-97 (declining to extend full faith and credit to Florida judgment where plaintiff did not follow Florida service requirements and evidence did not support finding of actual notice).

Conclusion

For the reasons stated above, we reverse the trial court's 27 February 2018 order and remand for entry of an order granting summary judgment in favor of Essa.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Judges HUNTER, JR. and BERGER concur.

STATE v. CASEY

[263 N.C. App. 510 (2019)]

STATE OF NORTH CAROLINA
v.
TIMOTHY RAY CASEY, DEFENDANT

No. COA18-269

Filed 15 January 2019

1. Evidence—sexual abuse of minor—no physical evidence—expert opinion—impermissible credibility vouching

In a prosecution for multiple sexual offenses against a minor, testimony offered by the State's expert witness that the minor had, in fact, been sexually abused despite the absence of any physical evidence was inadmissible because it could have been construed by the jury as vouching for the victim's credibility.

2. Appeal and Error—preservation of issues—effective assistance of trial counsel—failure to raise claim on appeal

In a prosecution for multiple sexual offenses against a minor, where a determination could be made from the cold record that defendant's trial counsel provided ineffective assistance—by failing to move to strike inadmissible testimony by the State's expert witness who opined that the victim had been subjected to sexual abuse, despite the absence of any physical evidence—appellate counsel could have raised the issue on appeal, and the failure to do so constituted a waiver. Defendant's motion for appropriate relief based on that issue was therefore procedurally barred.

3. Constitutional Law—effective assistance of counsel—appellate counsel—failure to raise claim on appeal

On appeal from convictions for multiple sexual offenses against a minor, defendant's appellate counsel provided ineffective assistance for failing to argue that the performance of defendant's trial counsel was deficient for failure to object to clearly inadmissible testimony by the State's expert that the victim had, in fact, suffered sexual abuse despite the absence of any physical evidence. The expert's opinion was outside the scope of defense counsel's questions and did not constitute invited error, but even if it did, appellate counsel should have raised the issue on appeal, and the failure to do so was prejudicial.

Judge BERGER concurring in part and dissenting in part.

Appeal by Defendant from an order entered 26 May 2017 by Judge Vance Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 3 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne M. Middleton, for the State.

North Carolina Prisoner Legal Services, Inc., by Lauren E. Miller, for the Defendant.

DILLON, Judge.

This present appeal is the second to our Court in this matter. In the first appeal, we found no error in the judgment convicting Defendant Timothy Ray Casey ("Defendant") of various sexual crimes. In this present appeal, Defendant seeks review of the trial court's order denying his Motion for Appropriate Relief ("MAR") seeking a new trial for ineffective assistance of his trial counsel and of his appellate counsel. For the reasons explained herein, we reverse the trial court's order and remand with instructions to enter an order granting Defendant's MAR.

I. Background

Defendant was indicted on one count of statutory sexual offense and two counts of taking indecent liberties, stemming from alleged encounters with the minor daughter ("Kim")[1] of his then live-in girlfriend.

The evidence at trial tended to show as follows: In 1996, when Kim was five years of age, Defendant moved in with Kim and her mother. Nine years later, on 1 January 2006, when Kim was fourteen years of age, Defendant broke up with Kim's mother and moved out. Two days later, on 3 January 2006, Kim told her mother, who was upset about the breakup, that Defendant had molested her during the nine-year period he had lived with them.

The State offered no physical evidence of the alleged sexual abuse or that Kim had told anyone of the abuse prior to telling her mother.

The State did call other witnesses, including a clinical psychologist, qualified as an expert. This expert opined on direct examination that Kim exhibited signs consistent with being sexually abused. During cross-examination, however, the expert went further and made statements

1. A pseudonym.

that Kim had, in fact, been sexually abused. Defendant's trial counsel made no motion to strike these statements.

The jury found Defendant guilty of all charges. Defendant appealed to this Court. During the first appeal to our Court, Defendant argued, in part, that the expert's testimony *offered on direct* – that Kim exhibited signs consistent with sexual abuse – amounted to impermissible vouching. Defendant's appellate counsel made no argument concerning the expert's statements made during cross-examination that Kim had been sexually abused. We found no error, never addressing any issues concerning the expert's statements made during cross-examination.[2]

Defendant subsequently filed a MAR with the trial court, alleging ineffective assistance by both his trial counsel and his appellate counsel. The trial court issued an order denying Defendant's MAR.

Defendant petitioned this Court for a writ of *certiorari* to review the order. We granted Defendant's petition and now review the merits of his arguments.

II. Standard of Review

We review the trial court's Order denying Defendant's MAR for "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). Based on the following, we reverse and remand for a new trial.

III. Analysis

Defendant argues that the trial court should have granted his MAR based on the ineffective assistance of counsel he received at the trial level and at the appellate level. For the following reasons, we conclude that (1) the testimony offered by the State's expert that Kim had, in fact, been sexually abused was inadmissible; (2) Defendant has waived any argument concerning whether he was denied effective assistance of *trial* counsel; and (3) Defendant was denied effective assistance of *appellate* counsel in his first appeal when counsel failed to make any argument in the first appeal concerning the expert's testimony that Kim had, in fact, been sexually abused. Accordingly, Defendant is entitled to a new trial.

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2. This appeal is before us for the second time; for a more detailed account of the facts in the underlying case, see *State v. Casey*, 2009 N.C. App. LEXIS 144*, *2-7 (N.C. Ct. App. Feb. 17, 2009).

A. Testimony by the State's Expert at Trial

[1] Regarding expert opinions offered in sexual offense prosecutions involving a child victim, our Supreme Court has instructed as follows: An expert may offer an opinion as to whether a child presents symptoms or characteristics *consistent with* those exhibited by children who have, in fact, been sexually abused. *See State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987). However, where there is no physical evidence of sexual abuse, an expert may not offer an opinion "that sexual abuse has *in fact* occurred" in that case. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (reasoning that "absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility"). And an expert's opinion which bolsters the child's credibility *may* constitute plain error. *State v. Towe*, 366 N.C. 56, 62-63, 732 S.E.2d 564, 568 (2012).

During the trial in this matter, the State offered no physical evidence that Kim had been sexually abused.

The State did tender an expert who opined on direct that Kim exhibited characteristics consistent with that of a sexual abuse victim, as generally allowed under our case law, though the basis of his opinion does not seem particularly compelling. That is, he did not base his opinion on the presence of emotional or psychological trauma that he observed in Kim that may also be found in a sexual abuse victim, as he testified that Kim did not exhibit any such signs. Rather, he based his opinion essentially on his belief that Kim was credible, listing two factors: (1) Kim's ability to describe various sexual acts at such a young age and (2) Kim had no reason to lie. We note, though, that Kim was actually fourteen (14) years old when she first reported the abuse and further that Defendant had ended his decade-long relationship with Kim's mother just two days before Kim first reported the abuse:

> Q: Doctor, do you have an opinion satisfactory to yourself as to whether or not [Kim] exhibited characteristics of someone who had been sexually abused? . . . Could you tell us what that is and your basis for that?
>
> A: My opinion is that she does display characteristics consistent with a child, young adult, adolescent adult who has been sexually abused. The characteristics that would be germane in this case are first that she describes in a plausible way sexual acts. That she describes those acts in a way that are consistent with other sources of information. That she has a – had an

> age-inappropriate sexual knowledge. [Second] [t]hat she did not have what would appear to be obvious alternative reasons for making a disclosure. . . . That she did not have obvious reasons for making a false disclosure . . . . That would be the extent of my basis.
>
> Q: Thank you, Doctor. No further questions.

In any event, as noted in the trial court's MAR order, Defendant's counsel during the jury trial did properly object to the opinion offered by the State's expert *on direct*. And Defendant's appellate counsel challenged this opinion in the first appeal. However, as we stated in the first appeal, the State's witness *on direct* never expressly opined that Kim had, in fact, been sexually abused, just that the manner in which she was able to describe the abuse was consistent with someone who had been sexually abused, an opinion which is generally allowed even where there is no physical evidence of sexual abuse.

Defendant argues in this current appeal that *on cross-examination*, the State's expert went further by opining that though Kim did not exhibit any characteristics of psychiatric trauma, she had, in fact, been sexually abused:

> Q: Well now according to your report, wasn't there – You said that you – you comment on her performance on the Rorschach test and you say there was no indication of any acute psychiatric disturbance.
>
> A: I apologize. I did misspeak. I did conduct evaluation involving the Rorschach, the TAT, and I had [Kim]'s father complete the CAB regarding her.
>
> Q: As a matter of fact, you found nothing unusual about this young lady, did you?
>
> A: Nothing unusual **other than my opinion that she had been sexually abused**.
>
> Q: And that's your opinion. But now when you are talking about characteristics of sexually abused children that's when you're talking about such things as post-traumatic stress syndrome, are you not?
>
> A: Possibly. Possibly.

(Emphasis added).

And Defendant argues that the State's expert *on re-direct* again opined that Kim's sexual abuse was a fact. Defendant points to testimony where the State's expert conceded that Kim did not exhibit anxiety, depression, or personality disorders which would be consistent with a sexual abuse victim, but that he still had his "psychiatric concerns" because of "the fact that [Kim] was abused":

> Q: What does psychiatric concern, what are you talking about?
>
> A: Well, you know, we've got a big read [sic] book that has all of our psychiatric diagnoses in it which include anxiety and depression and personality disorders and all of those things, and we – she does not fit the diagnostic criteria for any of those disorders. The closest she comes is what's called a V-Code diagnosis, which is not a diagnosis. It's sexual abuse of a child. And so it doesn't have to do in essence with her, that's why it's not a diagnosis of her. **It has to do with the fact that she was abused**.

(Emphasis added.) The State's expert explained immediately *on re-cross* what he meant by this statement, specifically that his statement was based on his superior ability as a trained professional to determine whether Kim was being truthful:

> Q: And [your statement made on re-direct is] based on her comments to you and nothing else?
>
> A: It's based on her statements to me being consistent with information provided by other individuals, being consistent over time, being detailed, being plausible, so I would say it's nothing else. It is her statements to me, but you know, that's what my education is about is being able to make inferences based on individual statements to me.

In its MAR order, the trial court found that the State's expert was not vouching for Kim's credibility when he stated that he found nothing unusual in Kim "other than [his] opinion that she had been sexually abused." Specifically, the trial court found:

> While it is clear that [the expert] could have said "except that in my opinion her symptoms are consistent with a child who suffered from sexual abuse", it is also equally clear and the court so finds that [the expert] was not

> issuing a diagnosis or vouching for [Kim's] credibility but redirecting Defendant's counsel to the overarching concern of the examination and disagreeing with counsel's underlying assertion that nothing was wrong with [Kim].

We conclude that this finding does not go far enough to support the trial court's order denying Defendant's MAR and is otherwise not supported by the evidence. The issue is not what the trial judge may have thought the expert intended by his testimony; the issue is whether the testimony, as stated, could be reasonably construed by at least one juror to be an opinion regarding Kim's credibility. And the finding is not otherwise supported by the evidence. It is not "clear" that the jury would not have construed the expert's statement as witness vouching. A plain reading of the expert's testimony is that even though Kim showed no signs of psychiatric or psychological disorder consistent with sexual abuse victims, it was the expert's opinion that Kim had been sexually abused *because* of his evaluation of her credibility. Perhaps, as the trial court states, the expert *meant* merely to repeat his opinion made on direct, but that is not what was heard by the jury.

Also, in its MAR order, the trial court found that the State's expert was not opining about Kim's credibility when he stated on re-direct that "[i]t has to do with the fact that she was sexually abused" but was merely explaining the coding in his records showing why Kim had been referred to him. Specifically, the trial court found as follows:

> Here again the Court finds that while the [expert]'s words are inartful, when understood in context, he states that [Kim] is not diagnosed with being sexually abused and that does not in essence have to do with her. He then in an effort to explain why [she] was being seen states in a shorthand. "It has to do with the fact [that] she was abused." While there is no doubt the [expert] could have removed all ambiguity by saying, [Kim] was referred to me to investigate her claims of improper sexual contact and while I did not make a diagnosis under the Diagnostic and Statistical Manual, we did code her visit showing that she was seen for investigation of sexual abuse. There is also no doubt that the [expert] was not rendering a formal opinion that [Kim] was sexually abused, or vouching for her credibility, but explaining both that [Kim] did not have a formal diagnosis and the charting number assigned to the [her] visit using the Diagnostic and Statistical Manual or big red book was sexual abuse.

We conclude that this finding is internally inconsistent and not supported by the evidence. The finding is internally inconsistent in that the finding states that the statement was "inartful" and ambiguous but also states that there was "no doubt" what the expert meant. Further, the finding contradicts the evidence: the expert explained that his statement regarding the "fact that she was abused" was not a mere coding issue but was based on Kim's statements "being consistent over time," "being plausible," and his ability to "make inferences based on [Kim's] statements." In other words, the evidence shows that there was tremendous doubt as to what the expert meant.

We have reviewed the testimony of the State's expert and conclude that in the absence of physical evidence of sexual abuse, this testimony was not admissible under our Rules of Evidence. His statements are similar to those determined to amount to plain error by our Supreme Court in *State v. Towe*, where the expert testified that the minor was in a category of children who have been sexually abused but who showed "no abnormal findings" or "physical findings of abuse." *Towe*, 366 N.C. at 59-60, 732 S.E.2d at 566. It is, indeed, reasonably probable that at least one juror construed the statements made by the State's expert, no matter his intent, as vouching for Kim's credibility.

We are not saying that Kim was not being truthful in her testimony. She very well may have experienced years of horrible abuse at the hands of Defendant. Or she may have been making untruthful comments about Defendant, either to get back at Defendant for leaving her mother or to cause her mother to be more focused on their mother-daughter relationship rather than her mother's relationship with Defendant. Or the truth may lie somewhere in between. But Kim's credibility was for the jury to assess in a fair trial, without the influence of an opinion by a doctor who had examined Kim that Kim was being truthful despite the absence of physical evidence of abuse.

B. Ineffective Assistance Of Counsel

It is axiomatic that a defendant's right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985). When a defendant attacks his conviction on the basis that his counsel was ineffective, he must show two things: (1) his "counsel's performance . . . fell below an objective standard of reasonableness" and (2) "the deficient performance prejudiced [him]." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). We must be highly deferential to counsel's strategy and performance as "there is a presumption

that . . . counsel acted in the exercise of reasonable professional judgment." *State v. Gainey*, 355 N.C. 73, 112-13, 558 S.E.2d 463, 488 (2002).

At the MAR hearing, Defendant argued that he received ineffective assistance of counsel ("IAC") by both his trial counsel and by his appellate counsel in failing to address the impermissible opinion testimony by the State's expert witness. We address the issue with respect to his trial counsel and his appellate counsel in turn.

1. IAC by Trial Counsel

[2] Defendant argues that his trial counsel's assistance was ineffective by failing to move to strike the opinion of the State's expert that Kim had, in fact, been sexually abused. We note that Defendant's appellate counsel did make an IAC argument in the first appeal but that it was not based on the trial counsel's failure to object to the State's expert opinion that Kim had, in fact, been sexually abused. Therefore, for the reasons stated below, we hold that any IAC challenge based on the Defendant's trial counsel is waived.

Our Supreme Court has instructed that a defendant's trial counsel should object to a witness' answer "as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it." *State v. Chatman*, 308 N.C. 169, 178, 301 S.E.2d 71, 76 (1983). Failure to object results in a waiver of the error. *Id.* Such error at trial is one readily available to argue on appeal.

Thus, our General Statutes provide that a motion for appropriate relief may be denied where "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3) (2009). Our Supreme Court has affirmed this rule. *See State v. Hyman*, 371 N.C. 363, 382-83, 817 S.E.2d 157, 169-70 (2018).

In *Hyman*, our Supreme Court held that a defendant waives the right to assert IAC by his trial counsel after a first appeal where he could have raised it in that appeal. *Id.* But our Supreme Court recognized that such right is only waived if the IAC issue could have been resolved *by the appellate court* in the first appeal, based on the cold record, without having to remand the matter to the trial court for consideration:

> As an initial matter, we must address the validity of the State's contention that the claim asserted in defendant's [MAR] is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3) . . . [.] As we have previously indicated, N.C.G.S. § 15A-1419(a)(3) is not a general rule that any

> claim not brought on direct appeal is forfeited on state collateral review and requires the reviewing court, instead, to determine whether the particular claim at issue could have been brought on direct review.
>
> [IAC] claims brought on direct review will be decided on the merits [only] when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as . . . an evidentiary hearing.
>
> . . .
>
> **As a result, in order to be subject to the procedural default specified in N.C.G.S. § 15A-1419(a)(3), the direct appeal record must have contained sufficient information to permit the reviewing court to make all factual and legal determinations necessary to allow a proper resolution of the claim in question.**

Id. (emphasis added) (internal marks and citations omitted).

Here, we conclude that the cold record from the first appeal was sufficient for our Court to determine in that first appeal that Defendant's trial counsel provided ineffective assistance of counsel. Defendant's trial counsel failed to object to the opinion offered by the State's expert that Kim had, in fact, been sexually abused. This testimony was clearly inadmissible. Defendant's trial counsel did have a duty to object to the testimony. *Chatman*, 308 N.C. at 178, 301 S.E.2d at 76 (1983) (holding that counsel should object to a witness' answer "as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it."). Failure to object results in a waiver of the error. *Id.*

We cannot fathom any trial strategy or tactic which would involve allowing such opinion testimony to remain unchallenged. Moreover, the trial transcript reveals that allowing the testimony to remain unchallenged was not part of any trial strategy. Indeed, a sidebar discussion between the trial judge and both attorneys indicates that it was not the intention or tactic of Defendant's counsel to introduce this into evidence.

Further, relying on precedent from our Supreme Court, we conclude that trial counsel's failure to object to the expert opinion was prejudicial. Again, the burden on Defendant was to show that there was a "reasonable probability that, but for counsel's [error], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Though this

burden is not a low one, the United States Supreme Court instructs that this standard is not so high as to require that a defendant "show that counsel's deficient conduct more likely than not altered the outcome[.]" *Id.* at 693.[3] Based on holdings from our Supreme Court finding similar testimony to amount to "plain error," we conclude that the cold record reveals that it is "reasonably probable" in a *Strickland* sense, that the failure of Defendant's counsel to object to the opinion testimony by the State's expert impacted the outcome of the trial.

Therefore, because we conclude that the cold record was sufficient for our Court to rule on an IAC claim in Defendant's first appeal, we hold that Defendant's MAR following that first appeal as it related to his trial counsel's performance is barred.

2. IAC by Appellate Counsel

[3] Defendant also argues that his appellate counsel's assistance was ineffective in failing to argue the correct portion of the State expert's opinion and by failing to cite to Defendant's trial counsel's performance. Defendant's IAC claim pertaining to his *appellate* counsel's performance is not procedurally barred. The trial court denied Defendant's MAR with respect to his appellate counsel's performance. For the reasons stated below, we hold that the trial court erred in denying Defendant's MAR in this regard.

Our Supreme Court has held that the two-pronged test for determining whether a defendant has received ineffective assistance of counsel, set out in *Strickland*, also applies to appellate counsel. *See State v. Todd*, 369 N.C. 707, 710-12, 799 S.E.2d 834, 837-38 (2017) (in order to prove that appellate counsel was ineffective, a defendant must show that his counsel's performance was deficient and that the deficiency was prejudicial).

In *Smith v. Murray*, the United States Supreme Court stated that "the decision not to press [a] claim on appeal [is not] an error of such magnitude that it render[s] counsel's performance constitutionally deficient under the test of *Strickland*[.]" *Smith v. Murray*, 477 U.S. 527,

3. The "reasonable probability" standard required by the United States Supreme Court for IAC claims should not be confused with the "reasonable probability" standard applied by our courts when reviewing for "plain error" under Rule 10 of our Rules of Appellate Procedure. It could be argued that a defendant's burden to show "plain error" is higher: To show IAC, the United States Supreme Court instructs that a defendant need not show that the error "more likely than not" affected the outcome. *Strickland*, 466 U.S. at 694. But to show "plain error," our Supreme Court requires that a defendant show that the error "tipped the scales" and was "fundamental" such that "justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

535 (1986); *see State v. Collington*, ___ N.C. App. ___, ___, 814 S.E.2d 874, 885 (2018). Indeed, not bringing a claim on appeal may be sound strategy as "winnowing out weaker arguments on appeal and focusing on" stronger arguments is the hallmark of appellate advocacy. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). However, failing to raise a claim on appeal that was plainly stronger than those presented to the appellate court is deficient performance. *Davila v. Davis*, ___ U.S. ___, ___, 137 S. Ct. 2058, 2067 (2017).

In the first appeal, Defendant's appellate counsel argued that the State's expert witness improperly vouched for the victim by testifying on direct that: "My opinion is that [the victim] does display characteristics consistent with a child, young adult, adolescent adult who has been sexually abused." However, appellate counsel's argument was clearly weak in light of the cases cited in its brief. *See State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) ("[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith."); *see also State v. Hall*, 330 N.C. 808, 817-18, 412 S.E.2d 883, 887-88 (1992). Moreover, appellate counsel failed to make any argument concerning the portion of the State expert's testimony before us now, erroneously stating in Defendant's appellate brief that "neither witness directly opined that Kim was 'credible.' "

The State argues that Defendant's appellate counsel could not have made an argument in the first appeal about the opinion offered by the State's expert during cross-examination since any error would be "invited error." Indeed, our General Statutes prevent a defendant from complaining of error on appeal where the error was invited by the defendant. N.C. Gen. Stat. § 15A-1443(c) (2005). However, our Supreme Court instructs that where a witness, on cross-examination, answers outside of the scope of the question or fails to respond to the question, the testimony is not said to be "invited." *State v. Wilkerson*, 363 N.C. 382, 412, 683 S.E.2d 174, 192-93 (2009) (finding an expert witness's answers during cross-examination were not invited where the defense counsel asked two narrow questions and the witness's response was neither within the scope of the question nor given in response to the question). We conclude that the opinion offered by the State's expert was outside the scope of the question posed by Defendant's trial counsel. Specifically, the expert was asked two narrow questions: "you found nothing unusual about this young lady, did you?" and "[your opinion offered on direct that she exhibited characteristics of one who has been sexually abused is] based on her comments to you and nothing else?" Both questions are leading

questions which the witness could answer with "yes" or no," but instead he added to this answer by giving additional details on his reasons for his opinion. The expert's statements that Kim actually was abused were outside the scope of these questions. *See Id.* Since Defendant did not ask the State's expert his opinion as to whether Kim was, in fact, sexually abused, the opinion did not constitute invited error. But even if it was invited error, Defendant's appellate counsel should have raised this matter as part of the IAC argument made during the first appeal.

We conclude that the error by Defendant's appellate counsel in the first appeal was prejudicial. There is a reasonable probability, in the *Strickland* sense which does *not* require a "more likely than not" probability, that the outcome of the first appeal would have been different had appellate counsel made arguments concerning the expert's opinion that Kim had, in fact, been abused, rather than erroneously conceding that the expert never overtly offered such opinion and focusing only on the opinion offered on direct. Indeed, the thrust of the argument in the first appeal was that the expert's opinion that Kim exhibited characteristics of a sexual abuse victim – a type of opinion which our Supreme Court has repeatedly held is appropriate – amounted to witness vouching. Thus, both prongs of *Strickland* are met.

IV. Conclusion

The testimony by the State's expert following his testimony on direct did amount to vouching for Kim's credibility.

Defendant's MAR as it pertains to the deficient performance of his *trial* counsel, however, is procedurally barred since this IAC claim could have been raised in the first appeal.

Defendant's MAR as it pertains to the deficient performance of his *appellate* counsel by failing to make any argument about the expert's inadmissible vouching of Kim's testimony is not procedurally barred. We conclude that Defendant was prejudiced by the failure of his appellate counsel in the first appeal to make an argument concerning the witness vouching by the State's expert. The only direct evidence of sexual abuse was the testimony of the alleged victim, Kim. Kim may well be telling the truth. But, in the absence of physical evidence of abuse, Defendant is entitled to have Kim's credibility assessed by a jury free from the taint of an opinion by a medical expert that Kim's testimony is truthful. Therefore, Defendant's MAR seeking a new trial should have been granted. We, therefore, reverse the order denying Defendant's MAR and remand for entry of an order granting Defendant's MAR and for other proceedings consistent with this opinion.

REVERSED.

Judge STROUD concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, *concurring in part, dissenting in part.*

I concur with the majority that appellate counsel was ineffective. I concur in result only with the majority's conclusion that Defendant's motion for appropriate relief regarding trial counsel is procedurally barred. However, because Defendant was not prejudiced by the testimony of Dr. Sheaffer, I respectfully dissent from the remainder of the majority opinion.

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and quotation marks omitted). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation and quotation marks omitted).

Here, the trial court's findings of fact were supported by competent evidence, and there has been no showing by Defendant, nor finding by the majority, that there was a manifest abuse of discretion related to the trial court's findings. Specifically, the trial court made the following relevant findings of fact:

> 12. Defendant's trial counsel did not object to the two instances set out above and contended to be plain error. Dr. Sheaffer's testimony . . . is clear to the Court and found as a fact not to be the rendering of expert opinion or vouching for the child's credibility, but rather disagreeing with counsel's assertion that nothing unusual was noted

about the child by Dr. Sheaffer and how the child's visit was coded by Dr. Sheaffer's office.

13. Dr. Sheaffer's testimony . . . on cross examination was an answer to Defendant's counsel's assertion that the Doctor had found nothing unusual with the child in the interview and testing. This cross testimony immediately followed the Doctor's testimony of the child's disclosure of sexual abuse to the Doctor as well as the Doctor's testimony that the child's symptoms were consistent with a child who had been sexually abused. The Defendant, by establishing that the child did not display mental or emotional problems sometimes associated with sexual abuse, was attempting to undermine the child's testimony of sexual abuse and Dr. Sheaffer's testimony that the child's symptoms were consistent with sexual abuse. Defendant's counsel asked, "you found nothing unusual about this young lady did you?" The Court finds both from watching the exchange and the record, the Doctor was attempting to answer Counsel's pointed question rather than vouch for the child's testimony. While it is clear that Dr. Sheaffer could have said "except that in my opinion her symptoms are consistent with a child who suffered from sexual abuse", it is also equally clear and the court so finds that Dr. Sheaffer was not issuing a diagnosis or vouching for the child's credibility but redirecting Defendant's counsel to the overarching concern of the examination and disagreeing with counsel's underlying assertion that nothing was wrong with the child. The record reveals as much as trial counsel did not object as she had when Dr. Sheaffer offered his expert opinion on direct. But again focused the questioning of the Doctor on the lack of the type of trauma sometimes displayed by children suffering sexual abuse, by asking "And that's your opinion but when you are talking about characteristics of sexually abused children that's when you're really talking about such things as post-traumatic stress syndrome, are you not?"

18. . . . Dr. Sheaffer explains why he found no reason for concern of the child's mental and emotional health during the interview and examination of the child. Dr. Sheaffer clarifies that he was referring to the lack of reason for psychiatric concern over the child to Defendant's counsel. He

is then asked by the State to explain psychiatric concern. Dr. Sheaffer explains under the "big red book" the child does not meet any diagnosis. Dr. Sheaffer explains that a V-Code diagnosis is not a diagnosis. "It is sexual abuse of a child. And so it doesn't have to do in essence with her, that's why it's not a diagnosis of her. It has to do with the fact she was abused."

19. Here again the Court finds that while the Doctor's words are inartful, when understood in context, he states that the child is not diagnosed with being sexually abused and that does not in essence have to do with her. He then in an effort to explain why the child was being seen states in a shorthand. "It has to do with the fact she was abused." While there is no doubt the Doctor could have removed all ambiguity by saying, the child was referred to me to investigate her claims of improper sexual contact and while I did not make a diagnosis under the Diagnostic and Statistical Manual [("DSM")], we did code her visit showing that she was seen for investigation of sexual abuse. There is also no doubt that the Doctor was not rendering a formal opinion that the child was sexually abused, or vouching for her credibility, but explaining both that the child did not have a formal diagnosis and the charting number assigned to the child's visit using the Diagnostic and Statistical Manual or big red book was sexual abuse.

. . .

25. The Court finds upon review of the record as to the evidence presented of the Defendant's guilt and the circumstances as revealed by the record under which Dr. Sheaffer's testimony, alleged to be plain error was presented to the jury that it is found by this Court that Dr. Sheaffer was not rendering his expert opinion that the child was abused or vouching for the child's credibility, but rather disagreeing with counsel's assertion that nothing unusual was noted about the child by Dr. Sheaffer and explaining inartfully how the child's visit was coded by Dr. Sheaffer's office.

26. This Court finds that the testimony of Dr. Sheaffer . . . did not have a probable impact on the jury's verdict. The

> testimony is therefore not prejudicial to Defendant in light of all the evidence at trial.

Based upon review of the transcript, the trial court's findings of fact are supported by competent evidence. Further, Defendant has failed to demonstrate that the trial court's findings of fact were "manifestly unsupported by reason or [are] so arbitrary that [they] could not have been the result of a reasoned decision." *Campbell*, 359 N.C. at 673, 617 S.E.2d at 19 (citation and quotation marks omitted).

It is also noteworthy that Judge Long, who ruled upon Defendant's motion for appropriate relief, also served as the presiding judge at Defendant's trial. He had the opportunity to review the cold record in this case in light of his experience as the presiding judge in this case. The majority, in essence, is telling the presiding judge that his review of the testimony is not as he recalls. Regardless, because the trial court's findings of fact are supported by competent evidence, they are binding on this Court. *Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35.

The trial court concluded as a matter of law that Defendant was not prejudiced by Dr. Sheaffer's testimony. When taken in context, the two portions of Dr. Sheaffer's disputed testimony, as found by the trial court, do not amount to vouching for the victim. Rather, Dr. Sheaffer was disagreeing with trial counsel's assertion that there was nothing wrong with the victim and attempting to explain coding decisions in his office based on the DSM. Had this argument been presented during the initial appeal, it is not reasonably probable that Defendant would have been granted a new trial.

STATE v. GONZALEZ

[263 N.C. App. 527 (2019)]

STATE OF NORTH CAROLINA
v.
FLORA RIANO GONZALEZ

No. COA18-228

Filed 15 January 2019

Child Abuse, Dependency, and Neglect—felony child abuse by prostitution—jury instruction—sexual act

The Court of Appeals found no plain error in a prosecution for felony child abuse by prostitution and sexual servitude of a child where the trial court's instruction to the jury regarding "sexual act" did not exclude vaginal intercourse. Although N.C.G.S. § 14-318.4(a2), under which defendant was charged, did not expressly define "sexual act," a prior case determined that the term included vaginal intercourse. *State v. McClamb*, 234 N.C. App. 753 (2014).

Appeal by defendant from judgments entered 27 April 2017 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 30 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne M. Middleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant.

DIETZ, Judge.

Defendant Flora Riano Gonzalez appeals her conviction for felony child abuse, arguing that the trial court committed plain error by improperly instructing the jury on the definition of the term "sexual act." This argument is squarely precluded by our decision in *State v. McClamb*, 234 N.C. App. 753, 760 S.E.2d 337 (2014). But our review of this case became more difficult when, several months ago, this Court issued its opinion in *State v. Alonzo*, __ N.C. App. __, __, 819 S.E.2d 584, 587 (2018).

Alonzo effectively overruled *McClamb* after concluding that *McClamb* had effectively overruled another, earlier decision. We ordered supplemental briefing from the parties to address *Alonzo* and, specifically, to address the growing trend among panels of our Court to overrule or refuse to follow precedent based on principles arising from our

Supreme Court's decision in *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

As explained below, *In re Civil Penalty* does not permit panels of this Court to disregard existing precedent because the panel believes that precedent improperly narrowed or distinguished other, earlier precedent. Thus, because the Supreme Court stayed the mandate in *Alonzo*— meaning it does not yet have any precedential effect— and because *McClamb* is controlling precedent that this Court must follow, we reject Gonzalez's arguments and find no error in the trial court's judgments.

Facts and Procedural History

Beginning in 2012, Flora Riano Gonzalez arranged for her twelve-year-old daughter to work as a prostitute, meeting men and having sexual intercourse in exchange for money. This continued for several years. Many men who had sex with Gonzalez's daughter used a condom but some did not. Gonzalez's daughter later became pregnant. Gonzalez reported her daughter's pregnancy to the police and claimed that she had been abducted and raped by four men. Law enforcement took Gonzalez's daughter to a health clinic where she was treated for chlamydia and underwent an abortion.

Gonzalez's daughter later began a steady relationship with a man when she was around sixteen years old. She became pregnant with her boyfriend's child. At that point, Gonzalez's daughter became concerned that Gonzalez would begin prostituting another of her children, who was now twelve years old. Gonzalez's daughter confided in a friend, who helped her meet with law enforcement to tell her story. The State arrested Gonzalez and charged her with felony child abuse by prostitution, felony child abuse by sexual act, human trafficking, and sexual servitude of a child. The case went to trial.

The jury acquitted Gonzalez of human trafficking, but found her guilty of both counts of felony child abuse and of sexual servitude of a child. The trial court sentenced her to consecutive terms of 25 to 39 months in prison for each of the child abuse convictions, and to another consecutive term of 92 to 120 months in prison for the sexual servitude conviction. Gonzalez timely appealed.

Analysis

Gonzalez argues that the trial court committed plain error when it instructed the jury that the phrase "sexual act" in the felony child abuse statute meant "an inducement by the defendant of an immoral or indecent touching by the child for the purpose of arousing or gratifying

sexual desire." Gonzalez contends that the court should have used a much narrower definition of "sexual act" that does not include vaginal intercourse. Gonzalez did not object to the court's instruction at trial and concedes that we review this issue for plain error.

The statute under which Gonzalez was charged, N.C. Gen. Stat. § 14-318.4(a2), is found in a portion of the criminal code addressing "Protection of Minors." The statute, titled "Child abuse a felony" provides as follows: "Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class D felony." N.C. Gen. Stat. § 14-318.4(a2). Importantly, the statute does not define the term "sexual act" and that phrase is not defined anywhere else in the subchapter.

In a separate subchapter of the General Statutes, in an article titled "Rape and Other Sex Offenses," there is a definition of the phrase "sexual act" that applies "[a]s used in this Article." N.C. Gen. Stat. § 14-27.20(4). That definition includes various forms of sexual activity but expressly excludes "vaginal intercourse":

> "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

Id.

The distinction between vaginal intercourse and other sexual acts exists in this section of our criminal statutes because the crime of rape, which involves vaginal intercourse, is treated differently from other sex offense crimes. *Compare* N.C. Gen. Stat. § 14-27.21 (First-degree forcible rape) *with* N.C. Gen. Stat. § 14-27.26 (First-degree forcible sex offense).

In two earlier cases, this Court applied the definition of "sexual act" found in N.C. Gen. Stat. § 14-27.20(4) to the felony child abuse statute, without conducting an analysis of *why* that definition should apply.[1] First, in *State v. Lark*, 198 N.C. App. 82, 678 S.E.2d 693 (2009), the Court addressed a case involving a defendant who engaged in fellatio and anal intercourse with his juvenile son. The defendant argued that the trial court included sexual acts in the jury instructions that were not

1. The General Assembly recodified these statutes, so their statutory citations vary in these opinions, but the statutory language remains the same.

supported by the evidence. *Id.* at 87, 678 S.E.2d at 698. In its analysis, this Court cited the definition of "sexual act" in N.C. Gen. Stat. § 14-27.20(4) in its determination that both fellatio and anal intercourse were "sexual acts." *Id.* at 88, 678 S.E.2d at 698.

Next, in *State v. Stokes*, 216 N.C. App. 529, 718 S.E.2d 174 (2011), the Court addressed a case in which a defendant challenged the sufficiency of the evidence that he digitally penetrated his juvenile daughter's vagina. The Court again cited the definition of "sexual act" in N.C. Gen. Stat. § 14-27.20(4) to conclude that digital penetration of a vagina is a sexual act. *Stokes*, 216 N.C. App. at 532, 718 S.E.2d at 177–78. *Stokes* also involved allegations of vaginal intercourse but, in its analysis of the issue, the *Stokes* court discussed only the digital penetration. *Id.*

Then, in *State v. McClamb*, 234 N.C. App. 753, 760 S.E.2d 337 (2014), this Court squarely addressed the question of whether the phrase "sexual act" in the felony child abuse statute included vaginal intercourse. In a detailed analysis, the Court distinguished *Stokes*, explaining that "*Stokes* is controlling with respect to the meaning of the term 'sexual act' . . . only in light of the narrow factual circumstances and legal issue raised therein." *McClamb*, 234 N.C. App. at 758, 760 S.E.2d at 341. The Court concluded that *Stokes* only addressed the issue of digital penetration and "did not hold" that the definition of sexual act in the felony child abuse statute "exclude[s] vaginal intercourse as a sexual act." *Id.* The Court also distinguished *Lark* in a footnote, explaining that it "is similarly limited to an analysis of fellatio as a sexual act." *Id.* at 758 n.2, 760 S.E.2d at 341 n.2.

Finally, several months ago, this Court addressed this issue again in *State v. Alonzo*, __ N.C. App. __, __, 819 S.E.2d 584, 587 (2018). In *Alonzo*, the Court held that "there is a conflict between our precedent" in *McClamb*, *Stokes*, and *Lark*. *Id.* Applying principles that stem from our Supreme Court's decision in *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), a breakthrough case that governs this Court's review of its own precedent, *Alonzo* declined to follow *McClamb*, concluding "we are bound by our earlier decision in *Lark*." *Alonzo*, __ N.C. App. at __, 819 S.E.2d at 587.

Our Supreme Court later stayed this Court's mandate in *Alonzo* and thus *Alonzo* does not yet have any precedential effect. *State v. Alonzo*, __ N.C. __, 817 S.E.2d 733 (2018). But Gonzalez urges us to adopt the same reasoning applied in *Alonzo*, and to hold that *McClamb* is not good law.

As explained below, we decline to do so because *In re Civil Penalty* does not empower us to overrule precedent in this way. What

occurred in *Lark*, *Stokes*, and *McClamb* is the same sequence of events that gave us *In re Civil Penalty*. In 1968, the Supreme Court decided a case that limited the power of state agencies to impose civil penalties under Article IV, Section 3 of the North Carolina Constitution. *State ex rel. Lanier v. Vines*, 274 N.C. 486, 497, 164 S.E.2d 161, 167–68 (1968). Later, this Court distinguished *Lanier* in a case upholding the power of a state agency to impose civil penalties under our Constitution. *N.C. Private Protective Servs. Bd. v. Gray, Inc.*, 87 N.C. App. 143, 146–47, 360 S.E.2d 135, 137–38 (1987). When the issue came before this Court again a few years later, we declined to follow *Gray*, holding that *Gray* "contradicts the express language, rationale and result of *Lanier*." *In re Civil Penalty*, 92 N.C. App. 1, 13, 373 S.E.2d 572, 579, *rev'd*, 324 N.C. 373, 379 S.E.2d 30 (1989).

The Supreme Court reversed this Court, holding that "the effect of the majority's decision here was to overrule *Gray*. This it may not do. Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

Thus, *In re Civil Penalty* stands for the proposition that, where a panel of this Court has decided a legal issue, future panels are bound to follow that precedent. This is so even if the previous panel's decision involved narrowing or distinguishing an earlier controlling precedent—even one from the Supreme Court—as was the case in *In re Civil Penalty*. Importantly, *In re Civil Penalty* does not authorize panels to overrule existing precedent on the basis that it is inconsistent with earlier decisions of this Court.

To be sure, our Supreme Court has authorized us to disregard our own precedent in certain rare situations. *See In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005). These arise when two lines of irreconcilable precedent develop independently—meaning the cases never acknowledge each other or their conflict, as if ships passing in the night. This typically occurs because the panel that decided the second case was unaware of the holding of the first. Ideally, this would never happen, but, given the size and complexity of our case law, it does. In that circumstance, the Supreme Court has authorized us to "follow[] . . . the older of the two cases" and reject the more recent precedent. *Id.*

This case is governed by *In re Civil Penalty*, not *In re R.T.W.* As explained above, the second of the conflicting decisions at issue here (*McClamb*) acknowledged and distinguished the first (*Lark* and *Stokes*).

McClamb, 234 N.C. App. at 758 n.2, 760 S.E.2d at 341 n.2. This means *In re R.T.W.* does not apply. Instead, under *In re Civil Penalty*, we must follow *McClamb* because it is the most recent, controlling case addressing the question. This, in turn, leads us to conclude that the trial court's instructions to the jury in this case were not erroneous, and certainly did not rise to the level of plain error.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Judges BRYANT and INMAN concur.

STATE OF NORTH CAROLINA
v.
CAMERON LEE HINTON

No. COA18-530

Filed 15 January 2019

Sentencing—aggravating factors—found by trial court—probation violation during prior 10 years—harmless error

When sentencing defendant for two common law robbery convictions, any potential error in the trial court's finding of an aggravating factor—willful violation of probation during the 10 years preceding the crime for which he was being sentenced—was harmless. Although it is for the jury to find the existence of an aggravating factor, here defendant had admitted (at the time of a probation violation report, which was several years prior to this sentencing hearing) to violating his probation by committing another criminal offense, and there was no question that defendant had indeed been convicted of another offense while on probation within the past ten years.

Appeal by defendant by petition for writ of certiorari from judgments entered 20 November 2017 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 13 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, Assistant Attorney General Daniel T.

Wilkes, and Assistant Attorney General Kimberly N. Callahan, for the State.

Irons & Irons, P.A., by Ben G. Irons II, for defendant-appellant.

ZACHARY, Judge.

Defendant Cameron Lee Hinton appeals by petition for writ of certiorari from judgments entered upon his two convictions for common law robbery. Defendant argues that the trial court erroneously sentenced him in the aggravated range because the jury did not find the existence of the aggravating factor beyond a reasonable doubt, in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and that his sentence should therefore be vacated and the matter remanded for resentencing. We conclude that any such error was harmless.

Background

A jury found Defendant guilty of two counts of common law robbery on 17 November 2017. Following the verdicts, the trial court dismissed the jury and held a sentencing hearing. The State had given timely notice of its intent to prove the existence of an aggravating factor in order to increase Defendant's sentences beyond the maximum statutory presumptive range of 25 to 39 months,[1] namely: that "during the 10-year period prior to the commission of the offense for which . . . [D]efendant is being sentenced," Defendant had been found in willful violation of the conditions of his probation, pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2017).

The State offered evidence in support of the aggravating factor at Defendant's sentencing hearing. State's Exhibit 31 established that Defendant was placed on probation in October 2013 pursuant to a suspended sentence following his conviction for assault on a female. The next month, Defendant's probation officer filed a probation violation report alleging that Defendant had willfully violated two conditions of his probation, in that he (1) "failed to make himself available for the mandatory initial home visit," and (2) "failed to provide the probation officer with documentation of enrollment in any abuser treatment program." Defendant's probation violation hearing was scheduled for 12 December 2013. That day, Defendant's probation officer amended the violation

1. Defendant was sentenced as a prior record level VI for the Class G felonies. *See* N.C. Gen. Stat. § 15A-1340.17 (2017).

report to include a third probation violation, alleging that Defendant had been convicted the previous day of possession with intent to sell or distribute cocaine, with an offense date of 15 November 2013. State's Exhibit 31 also revealed that Defendant "waived a violation hearing and admitted that he . . . violated each of the conditions of his . . . probation as set forth" in the violation report. Accordingly, on 12 December 2013, the trial court entered judgment revoking Defendant's probation due to willful violations of the conditions thereof and activated his suspended sentence. Thus, in the instant case, State's Exhibit 31 demonstrated that Defendant had, "during the 10-year period prior to the commission of the [common law robbery] offense[s] for which [he was] being sentenced, been found by a court of this State to be in willful violation of the conditions of probation." N.C. Gen. Stat. § 15A-1340.16(d)(12a).

On the basis of this aggravating factor, the State requested that the trial court sentence Defendant in the aggravated range of 31 to 47 months' imprisonment for his two common law robbery convictions. Defendant, however, citing N.C. Gen. Stat. § 15A-1340.16(a1) and *Blakely*, argued that the existence of the aggravating factor must be found by the *jury*, rather than the sentencing judge. After some discussion, the trial court ultimately found the existence of the aggravating factor, "as evidenced by State's Exhibit 31." The trial court thereafter sentenced Defendant in the aggravated range to two consecutive sentences of 31 to 47 months' imprisonment.

Although Defendant had given oral notice of appeal following the jury's guilty verdicts, he did not expressly give notice of appeal after sentencing because the trial court interjected, "I will allow—notice of appeal has been previously given in this case. We'll accept that notice of appeal. . . . I am going to appoint the appellate defender to represent [Defendant] from this point forward." An outburst by Defendant thereafter disrupted the proceedings. Nevertheless, Defendant filed a Petition for Writ of Certiorari with this Court, which we allowed by order entered 25 October 2018.

On appeal, Defendant argues that because the jury did not find the existence of the aggravating factor beyond a reasonable doubt, the trial court was not authorized to sentence him in the aggravated range. Defendant maintains that the matter should therefore be remanded for resentencing.

Discussion

The presumptive sentencing range by which trial courts are to sentence defendants is established by statute, based upon the classification

of the offense of which the defendant was convicted and the defendant's prior record level. *See* N.C. Gen. Stat. § 15A-1340.17. Nevertheless, a sentencing judge may deviate from the presumptive range and impose a sentence in the aggravated range pursuant to N.C. Gen. Stat. § 15A-1340.17(c)(4) if one or more enumerated aggravating factors are found to exist. *Id.* § 15A-1340.16(b).

N.C. Gen. Stat. § 15A-1340.16(d) sets forth thirty aggravating factors for sentencing purposes. For example, a defendant may be sentenced in the aggravated range if the underlying offense was committed "for the benefit of, or at the direction of, any criminal gang"; while the defendant was on "pretrial release on another charge"; or with the involvement of "a person under the age of 16." *Id.* § 15A-1340.16(d)(2a), (12), (13).

The aggravating factor at issue in the instant case is subdivision (12a), which provides that: "The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence." *Id.* § 15A-1340.16(d)(12a). In other words, a trial court may impose an aggravated sentence beyond the presumptive range if the defendant has been found in willful violation of the terms of his probation at any time within the previous ten years, even if such violation is unrelated to the offense for which the defendant is currently being sentenced.

The State must provide written notice to a defendant of its intent to prove the existence of an aggravating factor. *Id.* § 15A-1340.16(a6). Thereafter, "[t]he defendant may admit to the existence of [the] aggravating factor." *Id.* § 15A-1340.16(a1). However, "[i]f the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense[,]" *id.*, which the State will bear "the burden of proving beyond a reasonable doubt[.]" *Id.* § 15A-1340.16(a).

I. *Blakely v. Washington*

Before 2005, the State was not required to prove the existence of an aggravating factor beyond a reasonable doubt, but merely by a preponderance of the evidence. 2005 N.C. Sess. Laws 253, 253, ch. 145, § 1. In addition, the court, rather than the jury, determined whether the State had met that burden. *Id.* In 2005, the General Assembly revised the governing sentencing statutes in order to "conform with the United States Supreme Court decision in *Blakely v. Washington*." *Id.*

In *Blakely*, the United States Supreme Court addressed Washington's statutory regime, which allowed a trial judge to sentence a defendant

"beyond the standard maximum" sentencing range upon the trial judge's finding of one or more "statutorily enumerated ground[s] for departure" therefrom. *Blakely*, 542 U.S. at 300, 159 L. Ed. 2d at 411. The *Blakely* defendant had "pleaded guilty to the kidnapping of his estranged wife," and "[t]he facts admitted in his plea, standing alone, supported a maximum sentence of 53 months." *Id.* at 298, 159 L. Ed. 2d at 410. Nevertheless, "[p]ursuant to state law, the court imposed an 'exceptional' sentence of 90 months after making a judicial determination that he had acted with 'deliberate cruelty.' " *Id.* The issue presented to the Supreme Court was "whether this violated [the defendant's] Sixth Amendment right to trial by jury." *Id.* The Court concluded that it did.

"Taken together," the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment "indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477, 147 L. Ed. 2d 435, 447 (2000) (brackets and quotation marks omitted). *Apprendi* addressed the definition of an "element of the crime," *id.*, and established the following rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 147 L. Ed. 2d at 455. In light of this rule, the *Blakely* Court thus held "that a trial judge's sentencing of a defendant beyond the statutory maximum, based on the trial judge's finding [of an aggravating factor], violated the defendant's right to trial by jury under the Sixth Amendment to the United States Constitution." *State v. Blackwell*, 361 N.C. 41, 44, 638 S.E.2d 452, 455 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 114 (2007). The *Blakely* Court further established that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413. In North Carolina, the "statutory maximum" is "the presumptive range for a given offense and prior record level." *State v. Norris*, 360 N.C. 507, 514, 630 S.E.2d 915, 919, *cert. denied*, 549 U.S. 1064, 166 L. Ed. 2d 535 (2006).

The *Blakely* and *Apprendi* rules find their support both in history and in reason. At the time of our nation's founding, "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown." *Apprendi*, 530 U.S. at 478, 147 L. Ed. 2d at 448. There was an "invariable linkage of punishment with crime," and a defendant was therefore able "to predict with certainty [his] judgment from the face of the felony indictment[.]" *Id.* "[T]he judgment, though

pronounced or awarded by the judges, [was] not their determination or sentence, but the determination and sentence of the law." *Id.* at 479-80, 147 L. Ed. 2d at 448-49. "The judge was meant simply to impose that sentence . . . ." *Id.* at 479, 147 L. Ed. 2d at 448.

This history "highlight[s] the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83, 147 L. Ed. 2d at 450. In other words, where a defendant will face an aggravated punishment if the "offense is committed under certain circumstances but not others, . . . it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached." *Id.* at 484, 147 L. Ed. 2d at 451. As Justice Scalia explained in *Blakely*,

> [i]n a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Blakely, 542 U.S. at 309, 159 L. Ed. 2d at 417.

Quite simply, the United States Constitution provides every defendant with "the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313, 159 L. Ed. 2d at 420 (original emphasis omitted). "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 306-07, 159 L. Ed. 2d at 415-16. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 306, 159 L. Ed. 2d at 415. The *Blakely* Court thus explained:

> Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving

> a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," rather than a lone employee of the State.

Id. at 313-14, 159 L. Ed. 2d at 420 (citation omitted).

Accordingly, following *Blakely*, trial judges are no longer authorized to "enhance criminal sentences beyond the statutory maximum absent a jury finding of the alleged aggravating factors beyond a reasonable doubt." *Blackwell*, 361 N.C. at 45, 638 S.E.2d at 455. Our General Assembly therefore amended N.C. Gen. Stat. § 15A-1340.16 to require (1) that the jury determine whether an aggravating factor exists, thereby warranting an aggravated sentence, and (2) that the State bear the burden of proving the same beyond a reasonable doubt. 2005 N.C. Sess. Laws 253, 253, ch. 145, § 1.

II. Factor (12a) and *Blakely*

Nevertheless, "the Sixth Amendment was not written for the benefit of those who choose to forgo its protection." *Blakely*, 542 U.S. at 312, 159 L. Ed. 2d at 419. "[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." *Id.* at 308, 159 L. Ed. 2d at 417. Therefore, when the aggravating factor at issue is either admitted by the defendant or reflects the existence of a prior conviction, the trial court may determine whether that aggravating factor exists without invading the "province of the jury." *Id.*; *see also State v. Everette*, 361 N.C. 646, 653, 652 S.E.2d 241, 246 (2007) ("*Blakely* . . . specifically excluded several categories of aggravated sentences from the scope of the right it contemporaneously recognized: (1) those imposed on the basis of a prior conviction; (2) those imposed solely on the basis of the facts reflected in the jury verdict; and (3) those imposed solely on the basis of the facts admitted by the defendant, or to which the defendant stipulates . . . ." (ellipsis, internal citations, and quotation marks omitted)).

There are two aggravating factors that implicate the existence of a prior adjudication in this State. *See* N.C. Gen. Stat. § 15A-1340.16(d)(12a), (18a). At issue in the instant case is factor (12a): that Defendant had, within the past ten years, "been found . . . to be in willful violation of the conditions of probation." *Id.* § 15A-1340.16(d)(12a). Defendant did not admit to the existence of this aggravating factor at his sentencing hearing. *Cf. Everette*, 361 N.C. at 652, 652 S.E.2d at 245 ("[The State] argues . . . that the trial court's finding that [the] defendant was on pretrial release

at the time he committed the instant offenses comported with *Blakely* because [the] defendant admitted to the existence of this aggravating factor."). The other factor, (18a), allows for an aggravated sentence if "[t]he defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult." N.C. Gen. Stat. § 15A-1340.16(d)(18a).

Presumably under the supposition that the existence of a prior adjudication would satisfy the demands of due process, the General Assembly exempted (12a) and (18a) from the requirement that aggravating factors must be found by a jury: "If the jury, or with respect to an aggravating factor under G.S. 15A-1340.16(d)(12a) or (18a), *the court*, finds that aggravating factors exist . . . , the court may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." N.C. Gen. Stat. § 15A-1340.16(b) (emphasis added).[2] As Defendant notes, however, the constitutionality of this regime warrants further consideration.[3]

Under factor (12a), it is not for the sentencing judge to decide *whether* the defendant committed a willful violation of his probation within the past ten years, but whether the defendant *has already been found* to have committed the same. Thus, under the statutory framework, even if it were the jury's task to find the existence of factor (12a) beyond a reasonable doubt, its determination would be limited to finding the existence of the *prior adjudication* alone. Whether the jury was satisfied that the defendant had in fact willfully violated the terms of his probation would be of no concern.

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2. Despite subsection (b)'s explicit exception for the (12a) aggravating factor, Defendant observes that subsection (d)'s final paragraph provides only that "the determination that an aggravating factor *under G.S. 15A-1340.16(d)(18a)* is present in a case shall be made by the court, and not by the jury." N.C. Gen. Stat. § 15A-1340.16(d) (emphasis added). Defendant appears to argue that because this provision does not also include the (12a) aggravating factor, the General Assembly must not have intended to except it from the jury's determination at all. However, as the State notes, "[t]o construe this as meaning that a court *cannot* make a finding under N.C. Gen. Stat. § 15A-1340.16(d)(12a) would directly contravene the statute's plain language and, in effect, delete terms from it, which is not a proper mode of statutory construction in North Carolina."

3. Initially, the State argues that "[D]efendant has waived any constitutional arguments" pursuant to Rule 10(a)(1) of the appellate rules "because his objection in the trial court was premised upon a violation of N.C. Gen. Stat. § 15A-1340.16 rather than any constitutional violation." However, Defendant explicitly cited and relied on *Blakely* in his argument before the trial court. It was thus "apparent from the context" that Defendant's argument was upon constitutional grounds, and this issue is preserved for appellate review. N.C.R. App. P. 10(a)(1).

As Defendant notes, "*Blakely* allowed courts to make determination[s] of previous convictions because the defendants in those cases had pled guilty or had been found guilty by a jury beyond a reasonable doubt. In other words, they would have already exercised their rights under the Sixth and Fourteenth Amendments or waived those rights." (Citation omitted). In North Carolina, however, a probation violation is found neither by a jury nor by proof beyond a reasonable doubt:

> A proceeding to revoke probation [for a willful violation of the conditions thereof] is often regarded as informal or summary, and the court is not bound by strict rules of evidence. *An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt.* All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.

State v. Tennant, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (emphasis added) (brackets, internal citations, and quotation marks omitted). Thus, while Defendant was indeed "found by a court of this State to be in willful violation of the conditions of probation" in 2013, N.C. Gen. Stat. § 15A-1340.16(d)(12a), that judgment was entered pursuant to a lesser burden of proof than "beyond a reasonable doubt." *Tennant*, 141 N.C. App. at 526, 540 S.E.2d at 808.

III. Application

Given the standard of proof that applies in this State, it is arguable whether a judgment of a willful probation violation—be it by admission or court finding—is sufficiently tantamount to a "prior conviction" to allow a sentencing judge to use that previous finding as an aggravating factor justifying an increase in the length of a defendant's sentence beyond that authorized by the jury's verdict alone consonant with the demands of due process. *Compare Almendarez-Torres v. United States*, 523 U.S. 224, 240, 140 L. Ed. 2d 350, 366 (1998) ("Read literally, th[e] language [in *Mullaney v. Wilbur*], we concede, suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not . . . proved to a jury beyond a reasonable doubt. This Court's later case, *Patterson v. New York*[], however makes absolutely

clear that such a reading of *Mullaney* is wrong." (citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975) and *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281 (1977)), *and State v. Hunter*, 315 N.C. 371, 377, 338 S.E.2d 99, 104 (1986) ("[A] defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, the statute guarantees full due process before there can be a revocation of probation . . . ."), *with Apprendi*, 530 U.S. at 489, 490, 495, 147 L. Ed. 2d at 454, 455, 458 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided[.] . . . It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. . . . When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.' "), *and Blakely*, 542 U.S. at 311-12, 159 L. Ed. 2d at 418-19 ("Any evaluation of *Apprendi*'s 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant . . . would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted . . . from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." (internal citation omitted)).

As the State notes, this question "presents an issue of first impression for North Carolina's appellate courts." However, we need not decide that question today.

Error under *Blakely*—if error at all—is subject to harmless error review. *Blackwell*, 361 N.C. at 42, 638 S.E.2d at 453 (citing *Washington v. Recuenco*, 548 U.S. 212, 165 L. Ed. 2d 466 (2006)). Under that analysis, "our duty [is] to weigh the evidence supporting the aggravating factor and determine whether the evidence was so overwhelming and uncontroverted as to render any error harmless," *id.* at 46, 638 S.E.2d at 456 (quotation marks omitted), in that "any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* at 49, 638 S.E.2d at 458. "The defendant may not avoid a conclusion that evidence of an aggravating factor is uncontroverted by merely raising an objection at trial. Instead, the defendant must bring forth facts contesting the omitted element, and must have raised evidence sufficient to support a contrary finding." *Id.* at 50, 638 S.E.2d at 458 (internal citation and quotation marks omitted).

In the instant case, although Defendant did not admit to having willfully violated the conditions of his probation within the past ten years when the State submitted that as an aggravating factor at his sentencing hearing, Defendant clearly admitted the allegations contained in his probation violation report in 2013. We note with emphasis that the diminished standard of proof applicable to Defendant's probation violation report might well have induced Defendant's decision to forgo the time and expense of adjudicating the same. However, it is significant that Defendant's probation violation report alleged him to be in willful violation of the condition that he "commit no criminal offense" while on probation, pursuant to N.C. Gen. Stat. § 15A-1343(b)(1). Therefore, even if the aggravating factor were determined at Defendant's sentencing hearing as Defendant proposes it should have been under *Blakely*, the jury's task would have been confined to the simple determination of whether it was convinced—beyond a reasonable doubt—that Defendant had committed another offense while he was on probation within the past ten years. *Cf. Everette*, 361 N.C. at 654, 652 S.E.2d at 246 ("The aggravator at issue here concerned the objective question of whether 'the defendant committed the offense while on pretrial release on another charge' under N.C.G.S. § 15A-1340.16(d)(12)." (brackets omitted)). Defendant was indeed *convicted* on 11 December 2013 of another offense (possession with intent to sell/distribute cocaine), which Defendant committed while he was on probation, thus constituting a willful violation of the conditions thereof. Because Defendant had unquestionably been convicted of another offense while on probation within the past ten years, we necessarily conclude that Defendant cannot establish that any alleged *Blakely* error was not harmless.

NO ERROR.

Judges BRYANT and DILLON concur.

STATE v. JUENE

[263 N.C. App. 543 (2019)]

STATE OF NORTH CAROLINA
v.
DARIEUS ANDREW JUENE, DEFENDANT

No. COA18-526

Filed 15 January 2019

Identification of Defendants—pre-trial show-up—substantial likelihood of misidentification—reliability factors

A pre-trial show-up identification of defendant—while suggestive—did not create a substantial likelihood of misidentification where the three perpetrators (including defendant) of a robbery were shown from the back of a police car to the three victims approximately fifteen minutes after the crime, defendant matched the description given by the victims, and the victims spontaneously shouted, "That's him, that's him!" when they saw defendant and the other perpetrators.

Appeal by Defendant from judgments entered 15 February 2017 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 27 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

William D. Spence for the Defendant.

DILLON, Judge.

Defendant Darieus Andrew Jeune[1] appeals judgments against him for robbery with a dangerous weapon and other crimes based on a robbery which occurred at a shopping mall. Defendant argues that the trial court erred in denying his motion to suppress evidence because the pre-trial identification was impermissibly suggestive. We disagree and conclude that Defendant had a fair trial, free from prejudicial error.

I. Background

In September 2016, three victims were robbed in the Four Seasons Mall parking lot in Greensboro by three assailants. Defendant was

1. We note that the correct spelling of Defendant's last name is "Jeune." However, the indictments and judgments below all spell Defendant's last name as "Juene."

apprehended and identified by the victims as one of the assailants of the robbery. Defendant was indicted on robbery with a dangerous weapon and other charges.

In February 2017, Defendant filed a motion to suppress the show-up identification made by the three victims. In open court, the trial court denied Defendant's motion to suppress and made findings of fact and conclusions of law from the bench.

Defendant was found guilty of all charges by a jury and was sentenced in the presumptive range for each charge, to be served consecutively. Defendant gave oral notice of appeal in open court.

II. Analysis

On appeal, Defendant argues that the trial court erred in denying his Motion to Suppress Evidence. More specifically, Defendant argues that the show-up identification should have been suppressed.

A. Standard of Review

We review the trial court's denial of Defendant's motion to suppress for whether "competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Findings of fact are "conclusive and binding . . . when supported by competent evidence," while conclusions of law are reviewed *de novo*. *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994).

B. Pre-Trial Identification of Defendant

Defendant argues that the show-up procedure was impermissibly suggestive and created a substantial likelihood of irreparable misidentification, thereby violating his due process rights under the United States and North Carolina constitutions.

Identification evidence, such as a show-up, "must be excluded as violating the due process clause where the facts of the case reveal a pretrial identification procedure so impermissibly suggestive that there is a substantial likelihood of irreparable misidentification." *State v. Thompson*, 303 N.C. 169, 171, 277 S.E.2d 431, 433 (1981). Using a totality of the circumstances test, the central question is "whether . . . the identification was reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

Our Supreme Court has identified factors to consider when evaluating the reliability of the identification: "the opportunity of the

witness to view the criminal at the time of the crime; [] the witness's degree of attention; [] the accuracy of the witness's prior description of the criminal; [] the level of certainty demonstrated by the witness at the confrontation; and [] the length of time between the crime and the confrontation." *State v. Harris*, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983) (citing *Manson v. Brathwaite*, 432 U.S. 98, 109-16 (1976)).

Show-ups, while potentially inherently suggestive, are not *per se* violative of a defendant's due process rights. *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) ("An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability."). For example, in *Turner*, our Supreme Court held that a one-man show-up was admissible, though suggestive, where the victim's identification of the defendant was based on the victim attentively observing the defendant in poor lighting conditions during the alleged crime, having seen the defendant in the neighborhood previously, and a general physical description given to the police. *Turner*, 305 N.C. at 365, 289 S.E.2d at 374.

In the present case, the facts and circumstances surrounding the show-up are as follows: Before the alleged robbery occurred, Defendant and the other perpetrators followed the victims around in the mall and the parking lot. Defendant was two feet away from one of the victims at the time of the robbery. The show-up occurred approximately fifteen minutes after the robbery. Prior to the show-up, the victims gave a physical description of Defendant to the police. All three victims were seated together in the back of a police officer's squad car during the show-up. Defendant and the other perpetrators were handcuffed during the show-up. Defendant and the other perpetrators were standing in a well-lit area of the parking lot, in front of the squad car, during the show-up. Defendant matched the physical description given by the victims. Upon approaching the area where Defendant and the other perpetrators were detained, all three victims spontaneously shouted, "That's him, that's him!" All the victims also identified Defendant in court.

While these procedures were not perfect, we conclude that there was not a substantial likelihood of misidentification in light of the reliability factors surrounding the crime and the identification. *Turner*, 305 N.C. at 364, 289 S.E.2d at 373.

III. Conclusion

The pre-trial identification of Defendant was reliable. Even though the show-up may have been suggestive, it did not rise to the level of

irreparable misidentification. As such, the trial court did not err in denying Defendant's motion to suppress.

NO ERROR.

Judges Bryant and Zachary concur.

STATE OF NORTH CAROLINA
v.
MICHAEL TYRONE MAYO, JR., DEFENDANT

No. COA18-331

Filed 15 January 2019

Attorney Fees—criminal case—right to be heard

A civil judgment for attorney fees entered after defendant pleaded guilty to felony fleeing to elude arrest was vacated and the matter remanded to the trial court, where defendant had not been informed of his right to be heard on the issue of attorney fees.

Appeal by defendant from judgment entered 6 September 2017 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Associate Attorney General Cara Byrne, for the State.

Warren D. Hynson for defendant-appellant.

BERGER, Judge.

On September 6, 2017, Michael Tyrone Mayo, Jr. ("Defendant") pleaded guilty to felony fleeing to elude arrest. Defendant was sentenced to an active term of seven to eighteen months in prison. On September 14, 2017, Defendant filed a written notice of appeal. Defendant filed a petition for writ of certiorari on May 2, 2018, seeking appellate review on the entry of a civil judgment against him for attorney's fees, and review pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). We grant Defendant's petition for writ of certiorari, remand for hearing on the issue of attorney's fees, and dismiss the remainder of Defendant's appeal.

Factual and Procedural Background

On June 26, 2017, Defendant was indicted for fleeing to elude arrest by motor vehicle and for resisting a public officer. Defendant pleaded guilty to felony fleeing to elude arrest on September 6, 2017. As part of the plea arrangement, other charges were dismissed. Defendant stipulated to a prior record level of II, and he was sentenced to an active term of seven to eighteen months imprisonment. He was also ordered to pay court costs in the amount of $1,572.50. Defendant filed a notice of appeal on September 14, 2017.

On May 2, 2018, Defendant filed a petition for writ of certiorari alleging Defendant did not have proper notice and opportunity to be heard on the amount of attorney's fees and costs. In the same petition, Defendant argued in the alternative that this Court conduct an independent review of the record pursuant to *Anders v. California* and *State v. Kinch*. Defendant's counsel also filed a brief with this Court pursuant to *Anders* stating that he "has carefully reviewed the transcript, the superior court file, and relevant law," and was "unable to identify an issue with sufficient merit to support a meaningful argument for reversal of [Defendant]'s conviction."

Analysis

"[A] defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002). Section 15A-1444 of the North Carolina General Statutes provides that

> (a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.
>
> (a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

> (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.
>
> . . . .
>
> (e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

N.C. Gen. Stat. § 15A-1444 (a1), (a2), (e) (2017).

Defendant's right of appeal was limited to the grounds set forth in Section 15A-1444. Because Defendant pleaded guilty, stipulated his prior record level was II, was sentenced in the presumptive range, and never filed a motion to suppress pursuant to N.C. Gen. Stat. § 15A-979, he has no right to appeal.

However, because Defendant filed a petition for writ of certiorari to conduct an independent review of the record in accordance with *Anders v. California* and *State v. Kinch*, "we will review the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous." *Kinch*, 314 N.C. at 102-03, 331 S.E.2d at 667. Further, "we must examine any issue that defendant could have possibly raised." *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 197 (1998).

Counsel for Defendant has been unable to identify any meritorious issue to support a meaningful argument for reversal of Defendant's

conviction and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, and *State v. Kinch*, by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary to do so.

In his petition for writ of certiorari, Defendant contends that he did not receive notice and an opportunity to be heard on the amount of attorney's fees and costs. After review, we agree.

A criminal defendant may file a petition for a writ of certiorari to appeal a civil judgment for attorney's fees and costs. *State v. Friend*, ___ N.C. App. ___, ___, 809 S.E.2d 902, 905 (2018). The trial court may enter a civil judgment against an indigent defendant following his conviction in the amount of the fees incurred by the defendant's appointed trial counsel. N.C. Gen. Stat. § 7A-455(b) (2017). Before entering monetary judgments against indigent defendants for fees imposed by their court-appointed counsel,

> trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Friend, ___ N.C. App. at ___, 809 S.E.2d at 907 (vacated defendant's civil judgment for attorneys' fees and remanded for further proceedings on that issue).

In the present case, nothing in the record indicated that Defendant understood he had a right to be heard on the issue of attorney's fees, and the trial court did not inform Defendant that he had a right to be heard on the issue. The record reflects that the only mention of attorney's fees took place when the trial court stated "attorney's fees will be reduced to a civil judgment." Defendant was "not informed of the total amount of attorney's fees that would be imposed, nor given an opportunity to personally address the court." *State v. Morgan*, ___ N.C. App. ___, ___, 814 S.E.2d 843, 849 (2018) (vacating defendant's civil judgment imposing costs and attorneys' fees and remanded to the trial court). Accordingly, we vacate the civil judgment for attorney's fees and remand to the trial court for further proceedings on this issue only.

Conclusion

We vacate the civil judgment entered against Defendant by the trial court and remand for hearing on the issue of attorney's fees. The remainder of Defendant's appeal is dismissed.

DISMISSED IN PART; VACATED IN PART AND REMANDED IN PART.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
TRAVION SMITH

No. COA18-518

Filed 15 January 2019

1. Criminal Law—jury instructions—instructions requested by defendant—sufficiency of charge—jailhouse informant

In a first-degree murder prosecution in which a jailhouse informant testified against defendant in the hope of a charge reduction, the trial court did not err in providing the pattern jury instructions regarding interested witnesses, informants, and the jury's ability to consider a witness's interest, bias, prejudice, and partiality—while omitting defendant's requested instructions. The trial court's charge was sufficient to address the concerns about the informant's credibility that motivated defendant's request for a special instruction.

2. Evidence—relevance—jailhouse attack—defendant's guilt and informant's credibility

In a first-degree murder prosecution, the trial court did not err by admitting a jailhouse informant's testimony that he was threatened by defendant and then attacked by another inmate for "telling on" defendant when he returned to jail after testifying for the State in a pretrial hearing. The challenged testimony was relevant under Evidence Rules 401 and 402 on the issues of defendant's guilt and the informant's credibility, and the testimony's probative value was not outweighed by any danger of unfair prejudice, especially in light of similar unchallenged evidence of defendant's threats against the informant.

Appeal by defendant from judgment entered 22 February 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 29 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Lisa Miles for defendant-appellant.

TYSON, Judge.

Travion Smith ("Defendant") appeals from judgment entered following a jury's verdict finding him guilty of first-degree murder. We find no error.

I. Background

On the evening of 13 May 2013, the day following Mother's Day, Defendant, Ronald Anthony ("Anthony"), and Sarah Redden ("Redden") were together in the vicinity of North Hills shopping center in Raleigh. The trio had been walking around several neighborhoods in the area, breaking into unlocked cars and stealing GPS devices, headphones, cell phones, and other valuables. Eventually they arrived at the Allister Apartments complex. The Allister Apartments consisted of several unoccupied buildings that were under construction and one occupied building.

Melissa Huggins-Jones ("Huggins-Jones") and her eight-year-old daughter lived in one of the second-floor apartments of the occupied building. Huggins-Jones had recently moved to Raleigh from Tennessee to start a new job as a branch manager at a bank and to be closer to her mother, who lived in Wilmington. The front entrance of Huggins-Jones' apartment was located at the top of a set of stairs and down a breezeway. The back of the apartment had a balcony with a sliding glass door. The apartment located directly below Huggins-Jones' was being used as a temporary leasing office by the owner.

Huggins-Jones' air conditioning had not been working properly on 13 May and the previous weekend. Huggins-Jones had called the apartment building's maintenance worker several times to have the AC unit repaired. The night of 13 May, Huggins-Jones kept "the windows in the bedrooms" and the "sliding [glass] door to the balcony" "wide open" to try and keep the apartment cool. Huggins-Jones' daughter also had a large box fan operating in her bedroom.

After breaking into several cars, Defendant, Anthony, and Redden went to one of the unoccupied buildings of the Allister Apartments to look through their back packs at the items they had stolen. While Redden was charging her cell phone, Defendant and Anthony told her "they were going to go check something, and told [her] to wait there." Redden testified that she could not see where Defendant and Anthony went.

After waiting about ten minutes, Redden walked outside the unoccupied building to look around for Defendant and Anthony. Redden did not see Defendant and Anthony, so she went back inside the unoccupied apartment to continue charging her cell phone. After waiting five more minutes, Redden stepped outside the apartment and observed Defendant and Anthony walking from the direction of the occupied apartment building.

Defendant and Anthony again told Redden to stay at the unoccupied building, and they walked back in the direction of the occupied building. After waiting another ten minutes, Redden walked over to the occupied apartment. While Redden was outside the occupied apartment, a police car drove by and she hid in the breezeway of the building under the stairwell. Redden waited a minute until after the police car had left the area. She left the stairwell and heard a noise "like a shuffle" that made her look up.

Redden observed Defendant standing on the second-floor balcony of Huggins-Jones' apartment. Defendant was using his shirt to wipe off the balcony railing. Redden told Defendant they needed to leave and asked him where Anthony was. In response, Defendant indicated to the sliding glass door behind him.

A few minutes later, Redden saw lights from a car and she hid under the stairwell again. Redden observed a police car drive up and stop in the driveway of the apartment building for a "minute or so" and then leave. About five minutes later, Redden left the stairwell and walked to the other side of the apartment building. As she arrived at the other side of the building, Anthony ran up to her. Anthony told her "to just go" and that he was going to find Defendant.

Redden ran to a fence that was bordering the apartment complex and shortly thereafter observed Anthony and Defendant running towards her. Anthony was carrying water bottles and Defendant carrying two laptop computers. The three jumped the fence and ran along Six Forks Road to a parking lot at North Hills shopping center.

In the parking lot, Redden observed Anthony and Defendant wash their hands off with water from one of the water bottles. Anthony then called and asked an acquaintance to pick them up. Anthony referred to this acquaintance as "Reese." Reese arrived and picked up Defendant, Anthony, and Redden, and drove them to a nightclub called "Flashbacks." Redden testified that during the car ride, Anthony showed Reese an iPhone in a "woman's colored case" and a bloody knife. Redden stated that Defendant was not surprised by Anthony displaying the bloody knife. Redden observed Defendant "looked [to have] specs (sic) of blood on his shirt."

Upon arriving at the nightclub, Anthony and Reese went inside while Redden and Defendant waited outside. Redden asked Defendant, "What is going on?" Defendant told her "to let it go, don't ask questions, just forget about it."

After leaving the nightclub, Defendant, Anthony, and Redden checked into a Super 8 Motel at approximately 3:25 a.m. At the motel, Redden observed Defendant remove the two laptop computers from his back pack. Defendant kept a silver one and gave the other orange-colored one to Anthony. Redden testified that Defendant asked Anthony, "What the hell just happened?" Defendant then said, "Man, I got a son." Redden described Defendant as "nervous about not seeing his son."

Redden also testified that Defendant and Anthony had a conversation about "being happy that the little girl did not wake up." Huggins-Jones' daughter testified she kept a large, loud box fan in her bedroom to help her sleep and that she had it on that night. Huggins-Jones' daughter recalled "hear[ing] a screaming noise" that night, but went back to sleep because "[i]t didn't sound like it was in our apartment."

Redden never observed what Defendant and Anthony did with the knife, iPhone, or clothes they had worn earlier in the evening.

At approximately 7:00 a.m., Huggins-Jones' daughter discovered her mother's body. She went outside the apartment building and sought help from two construction employees working in the vicinity of the apartment complex. The two construction workers accompanied Huggins-Jones' daughter into the apartment unit and called 911. One of the construction workers observed Huggins-Jones dead upon the bed in her bedroom. He described her appearance in the bedroom: "I could tell she had blood all over her face and blood was everywhere, and I put three fingers on her wrist and there was no pulse, and she was cold as a block of ice[.]"

Shortly thereafter, emergency personnel arrived at the scene and confirmed Huggins-Jones had died from unnatural causes. Dr. Lauren Scott of the North Carolina Office of the Chief Medical Examiner performed the autopsy of Huggins-Jones and verified she had suffered at least eighteen separate blows to her face, neck, and upper chest area consistent with both blunt and sharp force trauma, in addition to multiple bruises.

Huggins-Jones injuries included, in part: a fractured skull, a broken jaw, a broken nose, a severed carotid artery, four dislodged teeth, "a chop wound" into her left shoulder, and puncture wounds in the left and right sides of her chest and shoulders. There were multiple bruises on her arms consistent with defensive wounds, in addition to several bruises on her face, back, and legs. Dr. Scott testified it took Huggins-Jones "anywhere from several minutes to an hour to die."

First responders and police investigators testified to the state of disarray in Huggins-Jones' apartment. Various items had been overturned on her dresser, her nightstand door had been torn off, window blinds had been pulled off the wall, a purse had been emptied on the kitchen table, a drawer from a jewelry armoire had been pulled out and blood found on one of the jewelry boxes.

Investigators discovered Huggins-Jones' blood on her bedroom doorknob, her daughter's bedroom doorknob, Huggins-Jones' purse, her wallet, two checkbooks, and a book cover in the hallway. A droplet of Huggins-Jones' blood was found on the apartment balcony, and a swabbing of the balcony railing tested positive for her blood.

Police investigators also discovered that the leasing office in the apartment unit immediately below Huggins-Jones' unit had been robbed. Various items were in disarray in the office and two Lenovo laptop computers, one silver and the other orange, were missing along with a Canon digital camera, charger, and camera bag.

Approximately a week later, on 20 May 2013, police found an orange Lenovo laptop bearing the same serial number as the one stolen from the leasing office beneath Huggins-Jones' apartment listed for sale on the Craigslist website. Detective Zeke Morse of the Raleigh Police Department posed as an interested buyer and contacted the seller of the laptop, Mike McCollum ("McCollum"), who lived in Wake Forest. Detective Morse offered to pay the listed price for the laptop and arranged to meet McCollum the afternoon of 20 May at a Wal-Mart store parking lot located in Wake Forest. McCollum became suspicious of the high offer price for the laptop. McCollum removed the listing for the

orange laptop from Craigslist, did not appear at the agreed upon location, and did not return further calls from Detective Morse.

Police began surveillance of McCollum's residence that same day and later obtained a warrant to search the residence on 21 May. During the execution of the search warrant, police discovered the stolen silver Lenovo laptop and arrested McCollum.

McCollum cooperated with the police and explained to them how had he obtained the silver laptop. Anthony had called and asked him to sell two Lenovo laptops that Anthony "was trying to get rid of" but had told him "they weren't stolen." Anthony text messaged McCollum pictures of the orange laptop, which McCollum used to list the laptop on Craigslist. Anthony used his girlfriend's, Amber Alberts' ("Alberts"), cellphone to send the text messages to McCollum. On 20 May 2013, McCollum posted the listing for the orange laptop, but he did not yet have possession of either the orange or silver laptops.

McCollum stated that on the morning of 21 May, he had received a phone call from Defendant. Defendant informed McCollum that he was at the Wal-Mart store in Wake Forest and had the silver laptop for McCollum to sell. McCollum sent his fiancée and her friend to pick up Defendant and bring him to McCollum's residence. Defendant provided McCollum with the silver laptop in exchange for McCollum giving him $50 up front. McCollum's girlfriend drove Defendant back to the Wal-Mart store in Wake Forest.

Undercover police officers conducting surveillance of McCollum's residence observed a person, who was later determined to be Defendant, leave the residence. The officers followed McCollum's fiancée's car as she drove Defendant back to the Wal-Mart store. McCollum's fiancée dropped Defendant off at the Wal-Mart store. One of the officers, Detective Gory Mendez of the Raleigh Police Department, remained behind at the Wal-Mart store to determine Defendant's identity. The other undercover officers followed McCollum's fiancée back to McCollum's residence.

Detective Mendez lost sight of Defendant for approximately thirty minutes, but eventually found him sitting inside a car with Anthony, Alberts, and another woman, in a parking lot near the Wal-Mart store. Detective Mendez observed the four individuals get out of the car and walk over to the Wal-Mart store. Detective Mendez made arrangements to have law enforcement officers with the Raleigh Police Department come pick up Defendant and Anthony and take them to the police station for questioning. During the time Detective Mendez was

following Defendant, other officers were executing the search warrant for McCollum's residence.

An officer requested Alberts to give him her phone for examination. The officer discovered pictures of the orange laptop on Alberts' phone and the text messages Anthony had sent McCollum. Law enforcement officers obtained a search warrant for Alberts' residence. The officers discovered a large bag that Alberts identified as Anthony's bag. Inside the bag were GPS devices, phone chargers, cords, and other items that were consistent with items reported stolen from cars in the neighborhood surrounding the Allister Apartments complex the night of 13 May 2013. When police took Defendant in for questioning, they requested he hand over his shoes, a pair of red and black Nike tennis shoes. A grand jury returned a true bill of indictment for the first-degree murder of Huggins-Jones against Defendant on 3 June 2013.

Defendant's capital murder trial began on 4 January 2016. Prior to Defendant's trial, Anthony pled guilty to first-degree murder and received a sentence of life imprisonment without the possibility of parole. Defendant stipulated at trial to being "involved with the other co-defendants in breaking into cars and was with the co-defendants before and after the incident and was involved in selling stolen items afterwards; i.e., the laptop."

Melvin Brown ("Brown") was called as a witness by the State. At the time of trial, Brown was serving a sentence for trafficking heroin. Brown met Defendant at the Wake County Jail, while Defendant was awaiting trial. Brown testified Defendant told him the reason he was in jail was because of a laptop. Brown stated that Defendant told him:

> [T]hey had broken into a house, [Defendant] and another guy, and that is how he got the laptop. He took the laptop, like $200, some jewelry.
>
> He told me while he was in a place robbing the place, that the lady confronted him. She started yelling at him and he told me he jumped on the lady. He was hitting her and she was screaming and stuff. And then he said that his co-defendant had stabbed the lady with a knife, stabbed her in the temple and stabbed her in the chest.

Defendant also told Brown that police did not have the knife, and that he was confident police would not find blood on the shoes he was wearing the night of the murder. Brown had provided the police and the prosecution with the information Defendant had allegedly

communicated to him in exchange for a twenty-month reduction in his prison sentence and a waiver of the mandatory $100,000 fine for trafficking heroin. Brown testified about threats he had received from Defendant in response to his cooperation with the prosecution. Brown also recounted a jailhouse attack against him in retaliation for speaking with the prosecution about Defendant.

Before the trial court charged the jury, Defendant requested a special instruction in writing regarding Brown's motivation for testifying. The trial court denied Defendant's requested special instruction.

Defendant did not present any evidence during the guilt-innocence determination phase of the trial. The trial court submitted to the jury the charges of: (1) first-degree murder under the theory of premeditation and deliberation and the alternative theory of felony murder; and (2) second-degree murder. The trial court also instructed the jury on the criminal liability theory of acting in concert with regards to each of Defendant's charges.

The jury found Defendant guilty of first-degree murder on the basis of premeditation and deliberation, as well as under the felony murder rule with burglary as the underlying felony. During the sentencing phase, the jury recommended a sentence of life imprisonment without the possibility of parole. The trial court entered judgment on 22 February 2016 and sentenced Defendant in accordance with the jury's recommendation. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court as of right from a final judgment in a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issues

Defendant argues the trial court erred: (1) by not giving his requested special jury instruction regarding potential bias of the State's witness Brown; and, (2) by allowing Brown to testify about his belief that Defendant was involved in an attack upon Brown while they were in jail, over Defendant's objection.

IV. Jury Instruction

A. *Standard of Review*

Defendant and the State disagree over which standard of review this Court should apply to the issue of the trial court's refusal of Defendant's requested instruction. Defendant asserts the standard of review is

de novo and the State asserts this Court should review for an abuse of discretion. This Court has recognized "the proper standard of review depends upon the nature of a defendant's request for a jury instruction." *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015).

Defendant cites *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009), to argue the proper standard of review is *de novo*. At issue in *Osorio* was whether sufficient evidence existed to support a jury instruction on acting in concert. *Id.* "Whether evidence is sufficient to warrant an instruction . . . is a question of law[.]" *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54 (2010). This Court reviews questions of law *de novo*. *Edwards*, 239 N.C. App. at 393, 768 S.E.2d at 621 (citations omitted).

Where the issue is not a question of law reviewed *de novo*, the appropriate standard of review is for an abuse of discretion. *State v. Lewis*, 346 N.C. 141, 145, 484 S.E.2d 379, 381 (1997) ("[w]hether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion.") (quoting *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988)); *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003) ("the choice of instructions given to a jury 'is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion.' ") (quoting *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002)).

The issue before us involves the trial judge's choice of language in the instructions given to the jury. We review the trial court's ruling for an abuse of discretion. *See Lewis*, 346 N.C. at 145, 484 S.E.2d at 381.

"A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (citation omitted), *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). However, the trial court "need not give the requested instruction verbatim." *Id.* Instead, "an instruction that gives the substance of the requested instructions is sufficient." *Id.* To show that the refusal to give an instruction was error, the defendant "must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions." *State v. Beck*, 233 N.C. App. 168, 171, 756 S.E.2d 80, 82 (2014) (citation omitted).

"[W]hen instructions, viewed in their entirety, present the law fairly and accurately to the jury, the instructions will be upheld." *State*

v. Roache, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004). "[I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *State v. Cornell*, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citations and brackets omitted).

"In order for a new trial to be granted, the burden is on the defendant to not only show error but to also show that the error was so prejudicial that without the error it is likely that a different result would have been reached." *State v. Owen*, 133 N.C. App. 543, 549, 516 S.E.2d 159, 164 (1999) (citation omitted).

B. *Special Instruction*

[1] Defendant requested the following special jury instruction regarding Brown's testimony:

> There is evidence which tends to show that a witness testified with the hope that their testimony would convince the prosecutor to recommend a charge reduction. If you find that the witness testified for this reason, in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony, in whole or in part, you should treat what you believe the same as any other believable evidence.

The trial court denied the requested special instruction, and gave the jury the pattern jury instructions on interested witnesses and informants, as follows:

> You may find that a witness is interested in the outcome of this case. You may take the witness's interest into account in deciding whether to believe the witness. If you believe the testimony of the witness in whole or in part, you should treat what you believe the same as any other believable evidence. [N.C.P.I.-Crim. 104.20 (2011)]
>
> . . .
>
> You may find that a State's witness is interested in the outcome of this case because of the witness's activity *as an informer*. If so, you should examine the testimony of the witness with care and caution. After doing so, if you believe the testimony in whole or in part, you should treat what you believe the same as any other believable evidence. (Emphasis supplied). [N.C.P.I.-Crim. 104.30 (2011)]

The trial court also gave the general pattern jury instruction concerning witness credibility:

> You're the sole judges of the believability of witnesses. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness's testimony.
>
> In deciding whether to believe a witness, you should use the same tests of truthfulness that you use in your everyday lives. Among other things, these tests may include the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness has testified; the manner and appearance of the witness; *any interest*, *bias*, *prejudice*, *or partiality a witness may have*; the apparent understanding and fairness of the witness; whether the testimony is reasonable; and whether the testimony is consistent with other believable evidence in this case.

N.C.P.I.-Crim. 101.15 (2011) (emphasis supplied).

Defendant contends his requested instruction regarding Brown was supported by the evidence because "Brown testified that, not only did he receive a benefit from providing this information to the State, he hoped for further reduction in his sentence after testifying."

Brown pled guilty to one count of trafficking in heroin on 20 August 2014. As part of his plea arrangement, the State agreed that Brown provided substantial assistance such that a departure was appropriate from the sentencing schedule for trafficking offenses. Sentencing in Brown's matter was continued until 17 March 2015, at which time Brown received a sentence which departed from the requirements of N.C. Gen. Stat. § 90-95(h)(3). At the time of Defendant's trial in January 2016, Brown had fulfilled all of the conditions for entry of his plea and judgment in Brown's case had been entered in Wake County Superior Court. Brown's plea to trafficking in heroin was not contingent upon his truthful testimony against Defendant, and he had no arrangement with the State to testify against Defendant. Defendant concedes that Brown received a reduced sentence for information he provided against Defendant.

Brown testified at trial that the prosecution had reduced his sentence for trafficking heroin by twenty months in exchange for the information he provided about Defendant. On direct examination, Brown further testified in the following exchange with the prosecution:

> Q. . . . So when you pled in, you got a benefit for talking to law enforcement, with Detective Brady back here?
>
> [Brown]. Yes, Ma'am.
>
> [Prosecutor]. And as a result of coming in here today, you don't automatically get any new benefit, is that right?
>
> [Brown]. No, Ma'am.
>
> [Prosecutor]. When we met with you this morning and with [your attorney], do you hope perhaps that you could get a benefit from this?
>
> [Brown]. Yes, Ma'am. I was under -- they told me that my lawyer could put a motion in.
>
> [Prosecutor]. At any point, have we agreed that you should get any additional time?
>
> [Brown]. No, Ma'am.
>
> [Prosecutor]. But your lawyer has said she might see if she can help you out?
>
> [Brown]. Yes, Ma'am.
>
> [Prosecutor]. So it's safe to say you hope that you can get a benefit?
>
> [Brown]. Yes, Ma'am.
>
> [Prosecutor]. But you are not guaranteed one as a result of coming in here today?
>
> [Brown]. No ma'am.

Defendant asserts "[t]here is a reasonable likelihood that, had the jury been properly directed to consider Brown's hope for further benefit after testifying, it would not have convicted [Defendant] of first-degree murder." We disagree.

The trial court's charge to the jury, taken as a whole, was sufficient to address the concerns motivating Defendant's requested instruction. The entire jury charge, including the instructions regarding interested witnesses, informants, and the jury's ability to take into consideration "any interest, bias, prejudice or partiality a witness may have" was sufficient to apprise the jury that they may consider whether Brown was interested, biased, or not credible. *See State v. Singletary*, 247 N.C. App.

368, 377, 786 S.E.2d 712, 719 (2016) (holding trial court's denial of defendant's requested instruction was not error because "[t]he trial court's jury charge was sufficient to address Defendant's concerns, as it left no doubt that it was the jury's duty to determine whether the witness was interested or biased"). The entire jury instruction given by the trial court was supported by the evidence and in "substantial conformity" with the instruction requested by Defendant. *State v. McNeill*, 346 N.C. 233, 239, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998).

Additionally, we note the State made no promises to Brown in exchange for his truthful testimony in this case. Defendant's requested instruction, that Brown "testified with the hope that [his] testimony would convince the prosecutor to recommend a charge reduction," was not supported by the law or the evidence as there was no possibility Brown could receive any such "charge reduction."

Brown had no pending charges at the time he testified against Defendant, and thus, there were no charges to reduce. When asked at oral argument before this Court how the State could make concessions to Brown, who was serving an active sentence with no pending charges, Defendant argued that a motion for appropriate relief could be filed on Brown's behalf. However, N.C. Gen. Stat. § 15A-1415(b) (2017), provides "the only grounds" for which Brown could have asserted a motion for appropriate relief. The exhaustive list set forth in that statute does not allow relief from entry of judgment for a defendant who subsequently provides truthful testimony. *See id.*

Even presuming the trial court erred by denying Defendant's requested instruction, Defendant cannot demonstrate prejudice to award a new trial. Defendant had ample opportunity to cross-examine Brown regarding his agreement with the State, as well as to argue to the jury that Brown's deal with the State, as well as Brown's hope for another future sentence reduction, motivated Brown's testimony and impacted his credibility and truthfulness.

In *State v. Mewborn*, this Court found no prejudice resulted from the trial court's refusal to give the pattern instruction on witnesses with immunity or quasi-immunity where the "defendant had the opportunity to cross-examine [the witness] about any alleged agreement and to argue to the jury regarding the impact of any alleged agreement upon [the witness'] credibility" and "the jury had before it evidence of [the witness'] arrest, the charges pending against [the witness], his cooperation with police, his plea agreement, and his pending sentencing hearing." *State*

v. Mewborn, 178 N.C. App. 281, 293, 631 S.E.2d 224, 232, *disc. review denied*, 360 N.C. 652, 637 S.E.2d 187 (2006).

Here, the jury was presented evidence of Brown's conviction and sentence for trafficking heroin, his testimony that he contacted the prosecution about the information he gained from Defendant because he "wanted to get substantial assistance for talking to them about the murder," and the details of the resulting agreement to reduce Brown's prison sentence.

Defendant has failed to show that the trial court's refusal to give the requested instruction had a likely impact on the jury's verdict or misled the jury. *See id.*

Defendant asserts the trial court's omission of the requested instruction was prejudicial because "[n]o physical evidence placed [Defendant] inside the apartment, much less implicate[s] him as an assailant."

The evidence showed there were clothes dryer vents on each side of Huggins-Jones' apartment balcony. Investigators found partial shoe prints atop the dryer vent on the right side of Huggins-Jones' balcony. City County Bureau of Investigation Agent Tracy Davis was admitted as an expert witness in the field of footwear examination at trial. Agent Davis testified the partial shoe prints atop the dryer vent had characteristics consistent with the black and red Nike tennis shoes Defendant was wearing on the night of the murder.

Redden observed Defendant standing on Huggins-Jones' apartment balcony, appearing to wipe off the railing. Redden testified she observed specks of blood on Defendant's shirt. A swabbing sample taken from Huggins-Jones' balcony railing tested positive for her blood. Redden recounted that Defendant and Anthony had a conversation the night of the murder that they were "happy that the little girl [Huggins-Jones' daughter] did not wake up."

Contrary to Defendant's assertion, there was substantial evidence, apart from Brown's testimony, from which the jury could have found Defendant was present inside Huggins-Jones' apartment with Anthony and participated in her murder which caused her blood to be upon his shirt.

We find no error in the trial court's ruling to omit Defendant's requested instruction. Presuming, *arguendo*, the trial court erred, Defendant cannot show the jury was misled by the omission of the requested instruction or that he was prejudiced. Defendant's argument is without merit and overruled.

V. Testimony On Jailhouse Attack

[2] Defendant also argues the trial court abused its discretion by permitting, over his objection, Brown 's testimony about a jailhouse attack.

Brown testified he was transferred to the Wake County Courthouse to testify for the State at a pretrial hearing in November 2015. Brown said that when he arrived at the courthouse, Defendant was present inside a holding cell. Brown stated Defendant threatened him and made a motion with his hands "like he was going to cut me. He was telling me I was dead."

After Brown testified at the pretrial hearing, he was taken back to the jail next door to the courthouse. Brown was placed in a pod across from Defendant, but separated by a glass window. Brown stated Defendant was staring at him through the window and appeared to be "talking trash." A few moments later "somebody came to him and threatened him" for testifying against Defendant. Brown returned to his cell. Shortly thereafter, the same person who had threatened him moments earlier came into the cell and assaulted Brown. Brown testified the assailant asked him if he was telling on "Tray." Brown stated "Tray" was a nickname for Defendant.

Defendant argues the evidence of the jailhouse attack, but not the threats made by Defendant, was both irrelevant and unduly prejudicial under Rules 401, 402, and 403 of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rules 401, 402, 403 (2017).

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Irrelevant evidence is evidence "having no tendency to prove a fact at issue in the case." *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368, *disc. review denied*, 332 N.C. 348, 421 S.E.2d 157 (1992). Under Rule 402, relevant evidence is generally admissible at trial while irrelevant evidence is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 402.

"Although a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (citation omitted), *disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007).

In challenging the relevancy of Brown's testimony regarding the jailhouse attack under Rules 401 and 402, Defendant asserts "The State

presented no evidence tending to show that [Defendant] knew about, suggested or encouraged the attack on Brown; [Defendant] was in a different cell block from Brown at the time of the assault. The testimony was therefore without proper foundation and irrelevant[.]" We disagree.

Brown testified Defendant was staring at him through a glass window in the jail immediately before the assailant approached Brown and threatened him. The same assailant returned several minutes later, asked if he was telling on "Tray," and assaulted him. This testimony clearly suggests Defendant was, at minimum, aware of the attack upon Brown or may have encouraged it.

"Generally, evidence tending to show a defendant has attempted to induce a witness to testify falsely in his or her favor is relevant and admissible against the defendant." *State v. Mebane*, 106 N.C. App. 516, 529, 418 S.E.2d 245, 253 (1992) (citing *State v. Minton*, 234 N.C. 716, 725, 68 S.E.2d 844, 850 (1952)). This evidence may consist of attempts to influence a witness by threats or intimidation. *State v. Smith*, 19 N.C. App. 158, 159, 198 S.E.2d 52, 53 (1973).

Evidence of threats against a witness may be relevant because it "may be construed as an awareness of guilt on the part of the defendant." *State v. Larrimore*, 340 N.C. 119, 151, 456 S.E.2d 789, 806 (1995) (citing *State v. Hicks*, 333 N.C. 467, 428 S.E.2d 167 (1993) and *Minton*, 234 N.C. at 716, 68 S.E.2d at 844).

Brown testified he did not want to be at trial because he had concerns for his safety. Our Supreme Court has held a witness may testify about his fear of a defendant and the reasons for his fear, as this is relevant to the issue of the witness' credibility. *State v. Lamb*, 342 N.C. 151, 158, 463 S.E.2d 189, 193 (1995) ("Where, as here, the witness has been the subject of past acts of violence and thereby has reason to fear another individual, those past acts are relevant to the issue of the witness' character for truthfulness or untruthfulness." (quoting *Larrimore*, 340 N.C. at 152, 456 S.E.2d at 807)).

The challenged testimony was clearly relevant under Rules 401 and 402 because it was probative to both issues of Defendant's guilt and Brown's credibility. *See id.*; *Larrimore*, 340 N.C. at 152, 456 S.E.2d at 807; *Hicks*, 333 N.C. at 467, 428 S.E.2d at 167; *Minton*, 234 N.C. at 716, 68 S.E.2d at 844. Defendant has failed to show the testimony at issue is irrelevant under Rule 401. N.C. Gen. Stat. § 8C-1, Rule 401.

Defendant additionally argues the trial court abused its discretion by admitting the challenged testimony under Rule 403 because its

probative value was substantially outweighed by the danger of unfair prejudice. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403.

A trial court's ruling under Rule 403 is reviewed for an abuse of discretion. *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015). This Court will find an abuse of discretion only where a trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citations omitted).

Defendant asserts: "Without Melvin Brown's irrelevant testimony that [Defendant] may have had something to do with some sort of assault on Brown, there is a reasonable likelihood the jury would have acquitted [Defendant] of first degree murder." "Certainly, the evidence was prejudicial to the defendant in the sense that any evidence probative of the State's case is always prejudicial to the defendant." *State v. Stager*, 329 N.C. 278, 310, 406 S.E.2d 876, 895 (1991) (citation omitted).

Defendant only challenges the portion of Brown's testimony regarding the threats and attack in the jail cell by the unknown assailant. Defendant does not challenge Brown's testimony that Defendant was "going to cut [Brown] . . . [and that Brown] was dead." Defendant cannot show he was prejudiced by the challenged testimony, much less that he was unfairly prejudiced in light of the similar unchallenged evidence of his threats to intimidate Brown.

The challenged testimony was relevant and its probative value significant to both the issues of Defendant's knowledge of his guilt and Brown's credibility, and was not substantially outweighed by any undue prejudice. Defendant has failed to demonstrate how the challenged testimony was unfairly prejudicial or how its prejudicial effect outweighs its probative value. Defendant has failed to show the trial court abused its discretion by admitting the challenged testimony.

VI. Conclusion

The trial court did not err in providing the jury instruction as given and omitting the instruction requested by Defendant. Defendant has failed to demonstrate how Brown's challenged testimony was irrelevant, unfairly prejudicial, or how its prejudicial effect outweighs its probative value under Rules 401, 402 or 403. N.C. Gen. Stat. § 8C-1, Rules 401, 402, 403.

Defendant has not shown any abuse of discretion from the admission of Brown's testimony regarding the jailhouse attack. Defendant

received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges BERGER and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY LEVON WILSON

No. COA18-550

Filed 15 January 2019

1. Obscenity—dissemination to minor—movie—showing that material obscene—sufficiency of evidence

In a prosecution for disseminating obscene material to a minor under 13 years of age, the State presented sufficient evidence that the material was obscene. In addition to the victim's description of the movie that defendant had shown her (two people having sex, including penetration), the State introduced evidence about defendant's pornography collection, and the State's evidence was sufficient for the jury to reasonably infer that the material defendant had shown to the victim was of the same nature as that in his pornography collection and was therefore obscene under contemporary social standards.

2. Constitutional Law—unanimous verdict—multiple counts—instructions

The trial court's instructions did not deny defendant his constitutional right to a unanimous jury verdict in a prosecution for indecent liberties and other charges. The trial court instructed the jury that defendant was charged with multiple counts for each offense, provided a single instruction for each offense without describing the conduct underlying each charge, and instructed the jury to consider each charge individually. There was no indication that the jury's verdicts in this case were not unanimous, considering the factors in *State v. Lawrence*, 360 N.C. 368 (2006).

3. Constitutional Law—defendant's right to testify—no right to have case reopened

The trial court did not abuse its discretion by declining defendant's request to reopen his case after he reconsidered his decision not to testify. Defendant had informed the trial court at the close of the evidence that he was not going to testify, after being addressed by the court, taking time to think about it, and consulting with his attorney. The trial court thoroughly explained its reasoning in declining to reopen the case upon defendant's request after the charge conference, and nothing in its justification was manifestly unsupported by reason.

Appeal by defendant from judgments entered 6 November 2017 by Judge Martin B. McGee in Union County Superior Court. Heard in the Court of Appeals 27 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

ZACHARY, Judge.

Defendant Timothy Levon Wilson appeals from judgments entered upon jury verdicts finding him guilty of taking indecent liberties with a child, assault by strangulation, disseminating obscene material to a minor under 13 years of age, and first-degree statutory rape of a child under 13 years of age. Defendant argues that (1) the trial court erred in failing to dismiss the charge of disseminating obscene material to a minor due to insufficient evidence; (2) the trial court's jury instructions violated Defendant's constitutional right to a unanimous jury verdict; and (3) the trial court violated Defendant's state and federal constitutional rights when it denied his request to reopen the case upon changing his mind that he wished to testify. We conclude that there was no error.

Background

On 30 March 2015, Defendant was indicted for five counts of taking indecent liberties with a child, four counts of sex offense in a parental role, four counts of first-degree statutory rape of a child under 13, one count of disseminating obscenity to a minor under 13, and one count of assault by strangulation. Defendant was indicted for six additional counts of taking indecent liberties with a child on 1 June 2015.

Six of Defendant's charges for taking indecent liberties with a child involved Defendant's older stepdaughter, Q.R.,[1] who was born in August of 1998. However, Defendant's arguments on appeal only concern Defendant's conduct against his younger stepdaughter, Q.B.

The evidence at trial showed that Defendant engaged in a pattern of sexual conduct with Q.B., who was born in May 2003. She was the youngest child in the home and was the first to arrive home from school each day. Q.B. would thereafter remain alone with Defendant until Q.R. and Defendant's son returned home from school, with Q.B.'s mother returning home much later. Most of the incidents for which Defendant was charged occurred during the weekdays when Q.B. was alone in the house with Defendant. Each of the acts was alleged to have occurred between 15 May 2011 and 1 January 2015.

Q.B. testified that Defendant had touched her on her vagina "[m]ore than one time," but she was best able to remember the details of two particular incidents. During the first, Q.B. was in the master bedroom and Defendant had her sit "[o]n the edge of his bed" and "touched [her] vagina with his hands." Q.B. said that "[she] was scared, [and she] didn't know what to do." Q.B. also testified about an incident that occurred while she was in her bedroom. She was lying on the bottom bunk of her bed when Defendant came into her room wearing only his boxers, lay down next to her, and began inserting his fingers into her vagina.

Q.B.'s testimony also revealed that Defendant had penetrated her vagina with his penis on multiple occasions. Several of those incidents occurred in the master bedroom. Q.B. recalled that on one occasion, she was alone in the house with Defendant after school. Defendant was naked, told Q.B. to take her clothes off, put Q.B. on his bed, and retrieved the "Blue Magic" hair grease from the bathroom. Defendant then "put [the] grease on his penis and he just— . . . he stuck it inside my vagina." Q.B. said that Defendant "stuck it in and out" "[m]ore than one time," until "he heard something" and stopped. Q.B. also testified in detail about a second incident that took place in the master bedroom, during which Defendant inserted his penis into Q.B.'s vagina after applying a different type of grease from a pink strawberry container. On another occasion, Q.B. said that one morning before school, Defendant "told me like go take a shower and it was like after. And then like I didn't have no clothes on because I went to go take a shower and then he just told me to go in his room and that's when he just stuck his penis in my vagina."

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1. Pseudonyms are used throughout the opinion to protect the identities of the minor victims and for ease of reading.

Q.B. said that Defendant eventually stopped "[b]ecause my sister called my name."

Additionally, Q.B. testified that Defendant had penetrated her vagina with his penis "[m]ore than one time" in the "kids' living room" of the house. On one of the occasions, she was lying on the floor watching television when Defendant "told [Q.B.] to take off [her] clothes and then he only had his boxers on." After Q.B. took her clothes off, Defendant "told [her] to lay back down and then he stuck his penis in [her] vagina." Defendant eventually got off of her because "[h]e was hearing noises."

Similar incidents occurred "[m]ore than one time" in the "adult living room." On one of those occasions, Q.B. said that she was sitting on the couch and that Defendant came into the room in his boxers, "told [her] to take off [her] clothes[,]" put hair grease on his penis, got "[o]n top of [her,]" and put his penis "[i]n and out" of her vagina while still wearing his boxers. Q.B. said that she "was scared," and that "[i]t hurt." Q.B. testified about yet another particular incident of vaginal intercourse that took place in Defendant's son's bedroom.

Lastly, Q.B. testified about an incident wherein Defendant was watching a nude sex scene in his bedroom and called her into the room to watch. Defendant was charged with disseminating obscenity to a minor under 13 years of age for that incident. Defendant moved to dismiss this charge due to insufficiency of the evidence, which the trial court denied.

Defendant's indictments only alleged the general conduct underlying each charge. However, the jury verdict sheets indicated that Defendant's four counts each of sex offense in a parental role and first-degree statutory rape, along with four of his charges for taking indecent liberties, were based upon Defendant's alleged conduct of "engaging in vaginal intercourse" with Q.B. in four distinct locations: (1) "in the Defendant's bedroom"; (2) "in the 'kids' living room' "; (3) "in the 'adult's living room' "; and (4) "in [Defendant's son's] bedroom," respectively. The verdict sheets indicated that Defendant's fifth count of taking indecent liberties was for "touching [Q.B.'s] genitals with his hands." Six additional counts of taking indecent liberties were for conduct involving Q.R., two of which the State voluntarily dismissed.

Defendant presented no evidence at trial, and the jury found Defendant guilty of all nineteen charges. The trial court arrested judgment on the four counts of sex offense in a parental role and four counts of taking indecent liberties with a child because they involved the same underlying conduct as the four counts of first-degree statutory

rape, for which the jury had also found Defendant guilty. The trial court imposed consecutive sentences against Defendant, in all totaling 1,510 to 2,070 months' imprisonment. Defendant gave oral notice of appeal in open court.

Motion to Dismiss

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of disseminating obscene material to a minor under 13 years of age because the State's evidence was insufficient to warrant the submission of that charge to the jury. In particular, Defendant contends that the State presented insufficient evidence to show that the material was "obscene material" within the meaning of the statute.

The standard of review upon a defendant's motion to dismiss is well established:

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. . . . Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012). When a defendant's motion to dismiss challenges "the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965). If so, then the defendant's motion to dismiss must be denied in order "for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *Id.*

In order to survive a motion to dismiss a charge of disseminating obscene material to a minor under N.C. Gen. Stat. § 14-190.8, the State must present substantial evidence to show (1) that the defendant is 18 years of age or older, and (2) that the defendant knowingly,

(3) disseminated, (4) to a minor under the age of 13, (5) any material which the defendant knew or reasonably should have known to be obscene within the meaning of section 14-190.1. N.C. Gen. Stat. § 14-190.8 (2017); *State v. Hill*, 179 N.C. App. 1, 14, 632 S.E.2d 777, 785 (2006).

Pursuant to N.C. Gen. Stat. § 14-190.1, material is considered to be "obscene" if:

> (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section [as, *inter alia*, vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted]; and
>
> (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
>
> (3) The material lacks serious literary, artistic, political, or scientific value; and
>
> (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C. Gen. Stat. § 14-190.1(b) (2017); *see also id.* § 14-190.1(c)(1). Whether particular content is obscene is to "be judged with reference to ordinary adults." *Id.* § 14-190.1(d). Moreover, "[n]othing in section 14-190.1 requires the State to produce the precise material alleged to be obscene." *State v. Mueller*, 184 N.C. App. 553, 566, 647 S.E.2d 440, 450, *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007).

In the instant case, Defendant's argument is premised primarily upon the fact that "contemporary community standards must take into account the fact that television regularly depicts couples having sex." Because "Q.B.'s description of what she saw[] also describes what can be seen on contemporary television"—particularly on premium cable channels such as Showtime, HBO, and FX that regularly depict "sexual activity and nudity"—Defendant argues that "the State failed to provide substantial evidence that what [Q.B.] saw was obscene according to contemporary standards." Defendant therefore argues that the trial court erred in denying his motion to dismiss the charge of disseminating obscenity to a minor. We disagree.

Q.B. testified to the following circumstances regarding the alleged incident:

> Q. [W]as there ever a time when the Defendant showed you any movies that you didn't like?
>
> A. Yes.
>
> Q. Okay. Can you tell me about that, please?
>
> A. It was like he had helped me with my math homework and he like had TV in his room and like it was already set up and—
>
> Q. [Q.B.], let's just wait a minute for that to go back, okay. Okay. So you said there was a TV in [Defendant's] room and it was already set up?
>
> A. Yes.
>
> Q. And so tell me what happened from there.
>
> A. He had told me to go in his room and then I saw on the TV a guy and a girl.
>
> Q. And you saw on the TV a guy and a girl. Before we talk about that, you said that [Defendant] told you to go in his room?
>
> A. Yes.
>
> Q. So you didn't just wander in there?
>
> A. No.
>
> . . . .
>
> Q. What were the guy and the girl on the TV doing?
>
> A. They were having sex.
>
> . . . .
>
> Q. And when you say they were having sex, can you describe what you saw?
>
> A. The guy was on top of the girl and he just stuck his penis inside of her.
>
> Q. And did the guy and the girl on TV, did they have clothes on at all?

A. No.

Q. And when you went in [Defendant's] room and saw that, did [Defendant] go in the room with you?

A. Yes.

Q. Did [Defendant] say anything to you?

A. No.

Q. And did you watch the TV?

A. Yes.

Q. Okay. How long did you watch the TV?

A. Like for a little bit.

. . . .

Q. And when you—did you eventually leave the room?

A. Yes.

Q. And how did you leave the room?

A. Just walked out.

. . . .

Q. Okay. And how did watching that movie make you feel?

A. Scared and disgusted.

. . . .

Q. Why were you scared?

A. Because I never seen anything like it.

On cross-examination, Q.B. clarified that Defendant was already in the master bedroom with the scene playing when he called Q.B. into the room.

In addition to Q.B.'s description of the movie that Defendant had shown her, the State introduced a photograph of three pornographic DVDs that detectives found during their search of the master bedroom. Q.B.'s mother also testified that Defendant "had so many" pornographic DVDs that he kept in that room. According to Q.B.'s mother, however, when Q.B. approached authorities with her allegations concerning Defendant, Defendant "packed [his pornography collection] up and

got rid of it and he called his older children and sent some of it away." She said that Defendant had also taken a container full of his remaining pornography collection "out to the shed" behind their property. Q.B.'s mother later found that collection and gave it to detectives. At trial, various titles from Defendant's collection were read to the jury.

When viewed in the light most favorable to the State, we conclude that this evidence would allow a jury to reasonably infer that the material Defendant showed to Q.B. was of the same nature of that contained in Defendant's pornography collection and was, therefore, "obscene" material under contemporary community standards, the dissemination of which to children under the age of 13 is unlawful. Accordingly, the trial court properly denied Defendant's motion to dismiss the charge of disseminating obscene material to a minor, as the State presented substantial evidence of each element of that offense.

Unanimous Jury Verdict

[2] Next, Defendant argues that the trial court's jury instructions denied him of his constitutional right to a unanimous jury verdict. We disagree.

The trial court instructed the jury that Defendant was charged, *inter alia*, with nine counts of taking indecent liberties with a child,[2] four counts of first-degree rape of a child, and four counts of sex offense in a parental role. The trial court provided a single instruction for each offense, without describing the details of the conduct underlying each individual charge. The trial court did, however, instruct the jury that "[y]ou must consider each count individually," and the verdict sheets identified each count by victim and included a brief description of the particular conduct alleged by reference to the location in which it occurred. In addition, the trial court instructed the jury that "[a]ll 12 of you must agree upon your verdict. You cannot reach a verdict by majority vote." The trial court also instructed the jury to indicate on the verdict forms "when you have agreed upon unanimous verdicts as to each charge."

Defendant, however, argues that because the charges were "numerous, complex and for some charges based on the same evidence, the trial court's minimalist jury instruction in which the court failed to instruct the jury that they must be unanimous on each charge violated [his] constitutional right to unanimous jury verdicts." Defendant contends that "because the record does not establish that the jury verdicts . . . were

2. Defendant was initially charged with eleven counts of taking indecent liberties with a child, but the State voluntarily dismissed two of those charges that involved Q.R.

unanimous," his convictions for taking indecent liberties with a child and first-degree statutory rape of a child must be vacated.[3]

Article I, section 24 of the North Carolina Constitution requires that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24. In *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006), our Supreme Court enumerated several factors relevant to the determination of whether a defendant has been deprived of his right to a unanimous jury verdict by virtue of the trial court's jury instructions, including:

> (1) whether [the] defendant raised an objection at trial regarding unanimity; (2) whether the jury was instructed on all issues, including unanimity; (3) whether separate verdict sheets were submitted to the jury for each charge; (4) the length of time the jury deliberated and reached a decision on all counts submitted to it; (5) whether the record reflected any confusion or questions as to jurors' duty in the trial; and (6) whether, if polled, each juror individually affirmed that he or she had found [the] defendant guilty in each individual case file number.

State v. Pettis, 186 N.C. App. 116, 123, 651 S.E.2d 231, 235 (2007) (citing *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613), *disc. review denied*, 362 N.C. 369, 662 S.E.2d 387, *cert. denied*, 555 U.S. 975, 172 L. Ed. 2d 337 (2008).

In the instant case, Defendant did not raise an objection at trial regarding the jury instructions and factor one, the unanimity of the verdicts. As for the third *Lawrence* factor, the jury was provided with separate verdict sheets for each charge, and the sheets included specific details outlining the particular conduct upon which each individual count was based. *Cf. Lawrence*, 360 N.C. at 369, 627 S.E.2d at 609 ("[N]either the indictments, jury instructions, nor verdict sheets identified the specific incidents of the respective statutory rape and indecent liberties charges for which the jury found [the] defendant guilty."). Lastly, the record does not reflect any confusion or question regarding the jurors' duty in the trial (factor five).

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3. In his brief, Defendant states that his "convictions for sex activity with a minor over whom the defendant had assumed the position of a parent," rather than his convictions for taking indecent liberties with a child, should be vacated. However, this appears to be a typo, as the trial court arrested judgment on those four counts.

Nevertheless, Defendant contends that "factors two, four and six support a finding that the jury's verdict was not unanimous." However, the case at bar is no different from the facts underlying these factors in *Lawrence* and *Pettis*, upon which Defendant relies.

Regarding the second *Lawrence* factor, Defendant maintains that "the court's only instruction on unanimity came at the end of the charge: 'All 12 of you must agree upon your verdict.' " Defendant argues that "this generic unanimity instruction was not sufficient to assure that each of the nineteen verdicts was unanimous" given the "complexity of the charges." "At a minimum," Defendant maintains that "the instruction should have been: 'All 12 of you must agree upon each of your *verdicts*.' " (Emphasis added). However, Defendant cites no authority for his proposition that the trial court's manner of instructing the jury was insufficient. Moreover, Defendant ignores the trial court's instructions that the jurors "must consider each count individually" and notify the court when they had "agreed upon unanimous verdicts *as to each charge*." (Emphasis added). Thus, the jury was indeed instructed on unanimity, and the second *Lawrence* factor was satisfied.

Concerning the fourth *Lawrence* factor, Defendant asserts that because the jury's deliberation in the instant case lasted for only thirty-one minutes, this indicates "that the verdicts may not have been unanimous." Defendant's argument directly contradicts the significance that our Supreme Court ascribed to this factor in *Lawrence*, wherein "the jury deliberated and reached a decision on all counts submitted to it in less than one and one-half hours." *Lawrence*, 360 N.C. at 376, 627 S.E.2d at 613. Just as in *Lawrence*, Defendant presented no evidence for the jury's consideration to contradict the victims' accounts. The fourth factor likewise tends to suggest that the jury's verdicts were unanimous.

Lastly, as to factor six, Defendant asserts that because "the jurors were not polled" in the instant case, "an opportunity to ascertain whether each verdict was unanimous was missed." However, Defendant's argument misrepresents the events. The jurors were in fact polled. After the jury rendered its verdicts, the trial court inquired: "I would like to ask, is that still—are those still your unanimous verdicts? If so, please raise your right hand." The transcript then reveals "that all 12 jurors . . . raised their right hand affirming that those are indeed their unanimous verdicts."

Accordingly, upon consideration of the *Lawrence* factors, we conclude that there is no indication in the present case that the jury's verdicts were not unanimous.

Moreover, the instant case is not one in which the risk of a non-unanimous verdict would have arisen by virtue of the trial court's instructions. Defendant argues that the jury instructions "contained no information for the jurors to decide how they were to proceed when the evidence could support various verdicts or could support a number of the verdicts." For example, Defendant notes that Q.B. testified that Defendant vaginally penetrated her in the "kids' living room" "[m]ore than one time[,]" but only detailed one particular incident in that location. Thus, Defendant argues that "one juror could have found that the detailed description met all of the elements for first degree statutory rape and then used Q.B.'s testimony that it happened more than one time to use the evidence of the other times for a guilty verdict on indecent liberties." Yet, "based on the same evidence another juror could have reasoned that the detailed description of the one incident supported a guilty verdict on indecent liberties [and] first degree statutory rape." Defendant maintains that "[t]his confusion would have been allayed if the court had instructed the jurors that they needed to be unanimous either on evidence supporting an individual offense or supporting numerous offenses."

The crimes with which Defendant was charged, however, do "not list, as elements of the offense, discrete criminal activities in the disjunctive." *Id.* at 375, 627 S.E.2d at 613 (quotation marks omitted) (citing *State v. Hartness*, 326 N.C. 561, 564, 391 S.E.2d 177, 179 (1990)). Instead, "the indecent liberties statute simply forbids 'any immoral, improper, or indecent liberties' " with any child under 13 years of age where such act is taken for the purpose of arousing or gratifying sexual desire. *Id.* at 374, 627 S.E.2d at 612 (quoting N.C. Gen. Stat. § 14-202.1(a)(1)). The particular act found to have been performed is immaterial to the unanimity inquiry "because the evil the legislature sought to prevent was the taking of any kind of sexual liberties with a child in order to arouse or gratify sexual desire." *State v. Lyons*, 330 N.C. 298, 306, 412 S.E.2d 308, 314 (1991). Thus, "even if some jurors [were to find] that [a] defendant engaged in one kind of sexual misconduct, while others found that he engaged in another, the jury as a whole would [still have] unanimously f[ou]nd that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties." *Lawrence*, 360 N.C. at 374, 627 S.E.2d at 612 (internal quotation marks omitted).

Here, the trial court instructed the jury that Defendant had been charged with nine counts of taking indecent liberties with a child, five of which involved conduct against Q.B. The trial court properly instructed that what constitutes "[a]n indecent liberty is an immoral, improper or

indecent touching or act by the Defendant upon the child." Pursuant to those instructions, the jury found Defendant guilty of all five counts of taking indecent liberties with Q.B. Indeed, Q.B. testified to at least five particular incidents that would have constituted indecent liberties as reflected in the verdict sheets: (1) touching and digital penetration of Q.B.'s vagina in the master bedroom; (2) penile penetration of Q.B.'s vagina using Blue Magic hair grease in the master bedroom; (3) penile penetration of Q.B.'s vagina using strawberry hair grease in the master bedroom; (4) penile penetration of Q.B.'s vagina in the master bedroom after Q.B. showered; (5) penile penetration of Q.B.'s vagina in the "kids' living room"; (6) penile penetration of Q.B.'s vagina in the "adult living room"; and (7) penile penetration of Q.B.'s vagina in Defendant's son's bedroom. It is irrelevant that Q.B. testified about some incidents having happened "more than one time" in a particular location. Quite simply, "while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred." *Id.* at 374, 627 S.E.2d at 612-13.

Similarly, the jury convicted Defendant of four counts of first-degree statutory rape of a child, and Q.B. testified to at least four specific incidents that constituted statutory rape and occurred in each of the four locations indicated on the verdict sheets. The record therefore reveals no danger that the four first-degree statutory rape verdicts were not unanimous. *See id.* at 376, 627 S.E.2d at 613 ("[D]efendant was indicted on five counts of statutory rape; Lucy testified [that she had sexual intercourse with the defendant thirty-two separate times, but testified] to five specific incidents of statutory rape, and five verdicts of guilty were returned to the charge of statutory rape. We conclude that defendant was unanimously convicted by the jury."); *see also State v. Wiggins*, 161 N.C. App. 583, 593, 589 S.E.2d 402, 409 (2003) ("As to the [five] charges of statutory rape, R.B. testified to four specific occasions she could describe in detail during which defendant had sexual intercourse with her . . . . R.B. also testified that defendant had sexual intercourse with her five or more times a week during this . . . period. Thus, where [five statutory rape] offenses . . . were charged in the indictments, and based on the evidence presented at trial, the jury returned [five] guilty verdicts, there was no danger of a lack of unanimity between the jurors with respect to the verdict."), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004).

Thus, not only does an examination of the *Lawrence* factors indicate that the jury's verdicts were unanimous, but the instant case is also not one in which the risk of a non-unanimous jury verdict would arise

by virtue of the trial court's instructions. Accordingly, we conclude that Defendant was unanimously convicted of the counts for which the trial court imposed judgment.

Defendant's Reconsideration of His Decision Not to Testify

[3] Lastly, Defendant argues that the trial court violated his "right to testify by denying [his] request to testify after the State and [he] had rested and by failing to ask [him] if he agreed with his attorney's decision not to make a proffer of this testimony[.]" We find no such error.

It is axiomatic that "[t]he right of a defendant . . . to present to the jury his version of the facts is a fundamental element of due process of law, guaranteed by the Sixth and Fourteenth Amendments to the federal Constitution and by Article I, Sections 19 and 23 of the North Carolina Constitution." *State v. Miller*, 344 N.C. 658, 673, 477 S.E.2d 915, 924 (1996). Also well established, however, is that "there is no constitutional right to have a case reopened." *State v. Perkins*, 57 N.C. App. 516, 520, 291 S.E.2d 865, 868 (1982). Where a defendant expresses a desire to testify after having already waived his right to do so, the decision whether to reopen the case and hear the defendant's testimony is within the sound discretion of the trial judge. *See id.*; *see also* N.C. Gen. Stat. § 15A-1226(b) (2017). Thus, a trial court's decision whether to reopen a case when a defendant reconsiders his decision not to testify will be upheld "unless it is shown to be manifestly unsupported by reason." *State v. Phillips*, 171 N.C. App. 622, 630, 615 S.E.2d 382, 387 (quotation marks omitted), *appeal dismissed and disc. review denied*, 360 N.C. 74, 622 S.E.2d 628 (2005).

In the instant case, toward the end of the State's evidence, the trial court suggested to Defendant that he begin thinking about whether he wanted to testify. At the end of the next day, Defendant informed the trial court that he would "decide tonight." Finally, after the close of the State's evidence on the next day, the trial court addressed Defendant regarding his decision whether or not to testify:

> Sir, you have the right to remain silent, any statement you make may be used against you. You don't have to say anything to me at all, you're represented by a lawyer, but I'd like to have this discussion with you to make sure you understand your rights concerning whether or not you wish to testify. You have the right to testify or not to testify. The decision about whether or not to testify should not be made by your lawyer, the district attorney, me, your family

> members or anyone else. That decision is yours and yours alone. If you choose not to testify, I will give an instruction to the jury saying they are not to hold that against you. If you don't mind discussing this with me, I want to ask you do you have any questions about your right to testify or not to testify or anything related to that right?

Defendant told the trial court that he did not have any questions on the matter, but said that he wanted to speak with his attorney one last time before he made his decision. After speaking privately with his attorney for fifteen minutes, Defendant informed the trial court that he was not going to testify. Defendant thereafter did not present any evidence, the defense rested, and the jury was excused.

However, after the charge conference, Defendant's attorney informed the trial court that Defendant had reconsidered his decision and now wished to testify. The trial court declined to reopen the case and bring the jury back in order to allow Defendant to testify, reasoning:

> I don't know how I could have been more careful than to go through with him throughout the week and talk to him about his right to testify or not to testify. I did it at the very beginning, I don't know that I did it every day but I believe I did it multiple days. I gave him—talked to him last night about it, explained it to him again last night, he said he wanted to have an opportunity to think about it, I said fair enough, gave him the opportunity to do that. Asked him this morning, again he delayed. Then he wanted an opportunity to consult with his attorney when the—I sent the jury out. I asked—after a while I asked the bailiff to go and ask that you all come back in so I can discuss it. I was informed that he needed additional time, I gave him additional time to do that. And he came back in I went through it in detail with him, he indicated he did not want to testify. Then the matter was—the case was rested in front of the jury, I then heard motions. . . . And to the extent I have discretion, I'm going to deny his request at this stage.

The trial court thoroughly explained its reasoning, and we see nothing in its justification to be manifestly unsupported by reason. Accordingly, the trial court did not abuse its discretion when it declined to reopen the case after Defendant reconsidered his decision not to testify.

Conclusion

For the reasoning contained herein, we conclude that (1) the trial court properly denied Defendant's motion to dismiss the charge of disseminating obscenity to a minor; (2) the trial court's instructions did not deprive Defendant of his right to unanimous jury verdicts; and (3) the trial court did not abuse its discretion when it declined to reopen the case after Defendant reconsidered his decision not to testify.

NO ERROR.

Judges BRYANT and DILLON concur.

KRISTI LYNNE DEAN WALSH, Plaintiff
v.
KENNETH RAY JONES, II, Defendant

No. COA18-496

Filed 15 January 2019

Child Custody and Support—custody modification—substantial change in circumstances—resumption of visitation with father

In an action to modify a custody order that had terminated all visitation with the father seven years prior, the trial court did not abuse its discretion by modifying custody to allow a gradual resumption of visitation with the father after making numerous unchallenged findings of fact detailing the positive changes in the father's life which the court determined would be of benefit to the child, and that it was in the child's best interests to resume visitation with her father.

Appeal by plaintiff from order entered 3 August 2017 by Judge Carol A. Jones in District Court, Duplin County. Heard in the Court of Appeals 28 November 2018.

Sumrell, Sugg, Carmichael, Hicks and Hart, P.A., by William C. Coley, III, for plaintiff-appellant.

White & Allen, P.A., by David Jarvis Fillippeli, Jr. and Ashley Fillippeli Stucker, for defendant-appellee.

STROUD, Judge.

Plaintiff-mother appeals an order modifying custody of the parties' daughter by allowing defendant-father to resume visitation with the child several years after a custody order which "immediately and permanently suspended and terminated" all visitation and contact of any sort with defendant-father. Where the trial court made extensive unchallenged findings of fact of the positive changes in Father's life since the prior order and determined these changes justify a modification of custody, the trial court did not abuse its discretion in modifying the custody order to allow a gradual resumption of visitation with Father.

I. Background

Plaintiff-mother and defendant-father are the parents of Tammy, born in 2004.[1] Mother and Father were living together when Tammy was born but stopped living together on 24 September 2005 due to Father's domestic violence. An order was entered in the domestic violence case which granted primary custody of Tammy to Mother and gave Father specific visitation. On 7 December 2005, Mother filed a complaint for custody and child support in this case, alleging Father had committed domestic violence against her, was abusing illegal drugs, and could not control his anger. On 30 January 2006, an order was entered suspending Father's visitation because he had tested positive for use of methamphetamine and marijuana and a referral was made to the Department of Social Services ("DSS").

On or about 27 March 2006, the trial court entered a consent order in the custody case allowing Father to resume visitation. This order noted that Father had repeatedly passed his drug tests but required him to continue drug testing in the discretion of DSS, to meet with DSS personnel by June 2006 to review the case, and urged Father to participate in an anger management course. In April and May, 2007, Father filed motions for modification of visitation alleging that in late March 2007, DSS prevented Father from having any contact with Tammy based upon Mother's report of inappropriate touching of Tammy by Father. Father further alleged DSS had completed its investigation of Mother's report as of 26 April 2007 and he had one visit with Tammy, supervised by his parents, but another report of inappropriate touching was made to DSS on 3 May 2007, ceasing his visitation again.

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1. A pseudonym is used to protect the identity of the minor involved.

On 23 August 2007, the trial court entered an order including detailed findings regarding Father's drug abuse and anger issues. In the August 2007 order, the trial court found it had "grave concerns about the Defendant's usage of controlled substances, his anger related issues, and his judgment/decision making process" and ordered that he have no contact with Tammy until he complied with the order's provisions. Father was required to submit to drug testing and could not resume visitation unless he was clean for three consecutive weeks; this order set a review hearing for September 2007. The trial court held a review hearing in September 2007 and entered an order again requiring drug testing and allowing conditional supervised visitation if he was in compliance. Another review order was entered in May 2008 which again required drug testing and further noted that Father could file for a modification after three consecutive weeks of clean drug tests.

In March 2010, Mother filed a motion for modification of custody and emergency relief asking to terminate Father's visitation because he had been charged with felony possession of methamphetamine and other drug-related crimes. Mother alleged Father was not living with his parents, who had supervised his visitation, and was not getting drug tests as ordered. The trial court entered an emergency order suspending Father's visitation. After several continuances, the trial court heard Mother's motion and entered an order in October 2010. The 2010 custody order included detailed findings regarding Father's drug abuse and his guilty plea to some of the criminal charges. The trial court found Father was not a fit and proper person to have visitation or contact of any kind with Tammy. The order granted sole legal and physical custody to Mother and provided

> that all visitation(s), association(s), and/or contact(s), including without limitation opportunities for same, of any kind and description, by and between the Defendant and the minor child, [Tammy], shall be and same is/are immediately and permanently suspended and terminated. That, further, neither Defendant nor any person/agent acting on his behalf shall visit, associate with and/or contact, or attempt to visit, associate with and/or contact, in any manner, fashion or way, the minor child or anyone having legal and authorized possession of said child. That any rights, legal or otherwise, of any kind or description that Defendant heretofore had relative to visiting or having contact, of any kind or description, with the parties' minor child, [Tammy], are hereby and shall be immediately

> terminated and ended; and, Defendant shall have no further contact of any kind or description with the said child.

In August 2016, Father filed a motion in the cause to modify custody alleging a substantial change in circumstances. Father alleged he had been released from prison in December 2015. While in prison, he had participated in DART, NA, and AA and continued to pay child support. On post-release supervision, all of his drug tests were negative; he was residing with his mother and intended to continue doing so; and he felt remorse for his past decisions. Father asked to resume visitation with Tammy.

Mother filed a response to Father's motion, asking that his motion be "denied" and "dismissed[;]" her response did not cite any specific rule supporting dismissal. In January 2017, the trial court began the hearing on Father's motion for modification but after hearing part of the evidence suspended the hearing and entered an order requiring the parties to participate in a "Best Interest Evaluation" regarding custody and visitation, to be performed by Dr. Jerry Sloan. The custody hearing later resumed and was completed in June 2017.

On 3 August 2017, the trial court entered an order modifying custody. The order includes detailed findings of fact regarding the prior orders and history. Findings 11 through 29 address the substantial changes in circumstances regarding Father's cessation of drug abuse and improvements in problem areas noted in the prior orders. Other findings noted that Mother opposed resumption of visitation and that Mother claimed Tammy did not want to visit with Father and was upset by the prospect of visitation.[2] The order allowed Father to resume visitation on a schedule of gradually increasing visitation, starting with supervised visits. The order also required Father to participate in individual, group, and family therapy to address his reintegration into Tammy's life. Mother appeals from the August 2017 order.

II. Denial of Motion to Dismiss

Mother contends that "the trial court erred by not granting plaintiff's Rule 41(b) motion for involuntary dismissal at the close of the defendant's evidence and also at the close of all of the evidence." (Original in first letter caps.) Mother argues that Father's evidence showed no change of circumstances which affects the interests of the minor child because he cannot prove there is any potential benefit to Tammy from a resumption of a relationship with Father.

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2. Tammy testified in chambers, and there is no record of her testimony.

We first note that because the trial court is the trier of fact in a custody trial, and the trial court is vested with broad discretion in this type of case, our appellate courts generally disfavor dismissal of a custody action under Rule 41(b):

> Dismissal under Rule 41(b) is left to the sound discretion of the trial court. In a Rule 41(b) context, the trial judge may decline to render any judgment until the close of all the evidence, and except in the clearest cases, he should defer judgment until the close of all the evidence.

Beck v. Beck, 175 N.C. App. 519, 523, 624 S.E.2d 411, 414 (2006) (citations, quotation marks, and brackets omitted). Since the trial court must make findings of fact to support an order under Rule 41(b), there is little practical or legal difference between an order *dismissing* a motion to modify custody under Rule 41(b) and an order *denying* a party's claim for modification of custody. *See Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973) ("There is little point in such a motion at the close of all the evidence, since at that stage the judge will determine the facts in any event." (citation quotation marks, and ellipses omitted)); *see also Hill v. Lassiter*, 135 N.C. App. 515, 517-18, 520 S.E.2d 797, 800 (1999) ("If the trial court grants a defendant's motion for involuntary dismissal, he must make findings of fact and failure to do so constitutes reversible error. Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purposes of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts." (citations omitted)). Whether the trial court is ruling on a motion to dismiss under Rule 41(b) or ruling on the substantive claim for modification of custody, the trial court is doing essentially the same thing; in both instances, the trial court must evaluate the evidence to determine whether the motion to modify custody has merit and must make findings of fact.

> On a motion to dismiss pursuant to Rule 41(b), the trial court is not to take the evidence in the light most favorable to plaintiff. Instead, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. The trial court must pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them.

> A dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits.

Id. at 517, 520 S.E.2d at 800 (citations and quotation marks omitted).

We review the trial court's denial of Mother's motion to dismiss for abuse of discretion, *see Beck*, 175 N.C. App. at 523, 624 S.E.2d at 414, and we also review the trial court's determination of the motion to modify custody for abuse of discretion. *See generally Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) ("Our trial courts are vested with broad discretion in child custody matters."). Since we must consider the trial court's findings of fact and conclusions of law to review both issues, we will proceed to address the substantive issue of modification of custody.

III. Modification of Custody

Mother contends the trial court erred in determining there was a substantial change of circumstances to justify the modification of custody. In *Shipman*, our Supreme Court stated that "[i]t is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody." *Id.* at 473, 586 S.E.2d at 253 (citations and quotation marks omitted). The change in circumstances may have either an adverse or beneficial effect on the child. *See id.* at 473-74, 586 S.E.2d at 253 ("The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody." (citations, quotation marks, and brackets omitted)). The trial court must first determine if there has been a substantial change in circumstances and if so, the trial court must consider the effect on the child and if a modification is in the child's best interests:

> As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare

> of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests.
>
> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

Id. at 474, 586 S.E.2d 250, 253 (citations omitted).

We review an order for modification of custody to determine if the findings of fact are supported by substantial evidence and if the conclusions of law are supported by the findings; the trial court determines the credibility and weight of the evidence. *See id.* at 474-75, 586 S.E.2d at 253-54 ("When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary." (citations and quotation marks)). If the findings of fact and conclusions of law are supported, then we review the trial court's decision regarding custody for abuse of discretion. *See generally id.* at 474, 586 S.E.2d at 253.

A. Findings of Fact and Conclusions of Law

Mother challenges only two of the trial court's findings of fact as unsupported by the evidence, numbers 58 and 60:

> 58. That there has been a substantial and material change in circumstances warranting the court in modifying the previous order of this court.
>
> . . . .
>
> 60. That the Defendant is a fit and proper person to have visitation with the minor child and it is in the best interests of and will best promote the general health, education and welfare of the minor child that she have visits with the Defendant.

All of the other findings of fact are binding upon this Court. *See In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909 (2009) ("[T]he trial court's findings of fact to which an appellant does not assign error are conclusive on appeal and binding on this Court."). Mother also challenges two of the trial court's conclusions of law:

> 2. There has been clear and convincing evidence of a substantial and material change in circumstances warranting the court in modifying the previous order of this court as outlined hereinbelow.
>
> . . . .
>
> 4. That the Defendant is a fit and proper person to have the visitation with the minor child and it is in the best interests of and will best promote the general health, education and welfare of the minor child that she have visits with the Defendant.

In reality, these "findings of fact" and "conclusions of law" say the same thing and are best characterized as conclusions of law. *See In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) ("[A]ny determination requiring the exercise of judgement, or the application of legal principles is more properly classified as a conclusion of law.") Further,

> [t]he labels "findings of fact" and "conclusions of law" employed by the trial court in a written order do not determine the nature of our review. If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that "finding" *de novo*.

Westmoreland v. High Point Healthcare, Inc., 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (citations omitted).

Although Mother did not challenge the trial court's findings of fact regarding the positive changes in Father and his life, her argument asks this court to reweigh the evidence, but we do not have this authority.[3] For example, Mother argues that Father's "evidence in this case does not eliminate anger issues from his lifestyle and does not equate to a substantial change in circumstance" and that Father may have been lying about his abstinence from drugs and alcohol. But the trial court found that Father completed the DART program; took various educational classes; consistently passed drug tests; stopped consuming drugs and alcohol; regularly attended church and participated in community service projects; became a member of a volunteer fire department; paid child support from his disability payment; did not have "any dealings with any of his pre-incarceration associates[;]" and lives with his mother who is a registered nurse. The trial court also made findings regarding defendant's love for his child and desire to be involved in her life in a positive manner. None of these findings of fact were challenged as unsupported by the evidence. The trial court assessed the credibility of Father's evidence regarding his cessation of drug abuse and changes to the problems in his life which led to his loss of visitation originally and determined that his evidence was convincing.

B. Effect on the Child's Welfare

Mother argues that "even if there was a change in circumstances [Husband] has failed to show that it has affected [Tammy's] welfare." (Original in first letter caps.) Mother contends that even if Father has reformed, Father cannot show that his sobriety and stability will have a beneficial effect on Tammy. We addressed a similar argument in *Shell v. Shell*, where the mother lost custody of the children because of her substance abuse, unstable housing, and failure to provide a safe home for the children. *See Shell v. Shell*, ___ N.C. App. ___, ___, 819 S.E.2d 566, 569 (2018). Four years later, the trial court determined that the positive changes in her life were substantial changes in circumstances affecting the welfare of the children and modified the custody order. *See id.* at

3. The trial court here even concluded there was "clear and convincing evidence" of the substantial change in circumstances, although only a preponderance of the evidence is required. *See Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001) ("[T]he applicable standard of proof in child custody cases is by a preponderance, or greater weight, of the evidence."). Although the higher standard of proof was not required, *see generally id.*, the trial court did not err by noting its analysis of the weight of the evidence.

___, 819 S.E.2d at 569-70. On appeal, the father argued that the mother's positive changes did not affect the welfare of the children:

> Father also contends that even if Mother's sobriety is a change of circumstances, it has no effect on the children. This argument is difficult to understand, since Father contended—quite correctly—in 2012 that Mother's substance abuse was still having detrimental effects on the children, even after she had been sober for a few months. Her life was still unstable, even if she was not actively using drugs or alcohol. Considering the other findings in the order regarding the positive changes in Mother's life which have accompanied her sobriety, this argument is entirely without merit. The trial court's order includes many findings detailing these effects—Mother's involvement with the children, her ability to provide a home and support them, and her becoming a caring parent instead of a selfish and unreliable one.

Id. at ___, 819 S.E.2d at 571-72 (citation omitted).

Here too, the trial court made findings regarding many positive changes in Father's life and determined that Tammy would benefit from resumption of her relationship with him. In any order changing a custodial schedule, to some extent the trial court must predict the effect the change will have on the child, especially when a parent has had no contact with the child for an extended period of time. Before Tammy resumes a relationship with Father, no one can know exactly how it will affect her, but based upon the trial court's findings of fact, the trial court did not abuse its discretion by concluding that Father's positive changes are beneficial for Tammy.

C. Best Interests

Mother also contends that "even if there was a change in circumstances which affected the welfare of [Tammy], there is insufficient evidence to support a finding that modifying the custody order by granting [Father] visitation with [Tammy] is in the child's best interest." (Original in first letter caps.) This argument is similar to the last but is based primarily upon Mother's evidence of Tammy's negative emotions and behaviors since finding out Father may be returning to her life. The trial court did not overlook these concerns but made findings of fact about them and addressed them by ordering a gradual resumption of visitation and requiring Father to participate in individual and joint therapy to assist in this transition. A child's potential difficulty in resuming a

relationship with a parent who has been absent from her life does not mean that the trial court cannot order a resumption of visitation. Even if Tammy stated a desire not to resume a relationship with Father, the trial court does not have to accede to her wishes. *See Mintz v. Mintz*, 64 N.C. App. 338, 340-41, 307 S.E.2d 391, 393 (1983) ("If the child is of the age of discretion, the child's preference on visitation may be considered, but his choice is not absolute or controlling."). The trial court did not abuse its discretion in concluding it is in Tammy's best interests to resume visitation with Father.

IV. Conclusion

We affirm.

AFFIRMED.

Judges DIETZ and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JANUARY 2019)

D.A.N. JOINT VENTURE PROPS. OF N.C., LLC v. N.C. GRANGE MUT. INS. CO. No. 18-265	Greene (15CVS197)	Appeal Dismissed
DINGEMAN v. MISSION HEALTH SYS., INC. No. 18-634	N.C. Industrial Commission (15-036998) (15-055793)	Affirmed
GRAY v. N.C. DEP'T OF PUB. SAFETY No. 18-446	Office of Admin. Hearings (17OSP04389)	Remanded in part, affirmed in part
HUGHES v. DROHAN No. 18-399	Forsyth (14CVD6521)	Affirmed in Part, Reversed in Part and Remanded
IN RE A.H. No. 18-624	Orange (16JT49)	Affirmed
IN RE C.L.R. No. 18-314	Wilkes (14JT31-32)	Affirmed
IN RE N.J.M.G. No. 18-715	New Hanover (16JT316)	Affirmed
IN RE S.M.M. No. 18-561	Cabarrus (15JT132)	Dismissed in part; affirmed in part, and remanded in part.
IN RE T.O. No. 18-596	Mecklenburg (08J215-216) (16J243)	Affirmed
ROLLS v. JUST STUMPS, INC. No. 17-1322	N.C. Industrial Commission (Y27414)	Affirmed
STATE v. AGUILH No. 18-310	Gaston (15CRS63902)	No Error
STATE v. BAKER No. 17-1354	Union (16CRS54621)	No Error

STATE v. BLUE No. 18-677	Davidson (15CRS52791-93)	No Error
STATE v. BOVA No. 18-413	Iredell (14CRS685)	Affirmed
STATE v. BURNEY No. 18-455	Cumberland (15CRS64194)	No Error
STATE v. DINKINS No. 18-138	Buncombe (15CRS91878)	Dismissed
STATE v. DISORDA No. 18-620	Lincoln (16CRS53959)	No Error
STATE v. FORD No. 18-535	Durham (16CRS60372)	Dismissed
STATE v. GIBSON No. 18-454	Catawba (16CRS4854)	Dismissed in Part, Vacated in Part and Remanded.
STATE v. GOMEZ No. 18-144	Haywood (16CRS480) (16CRS482) (16CRS51082)	No Error
STATE v. HOPPER No. 18-558	Cabarrus (14CRS51843) (17CRS473)	No Error
STATE v. HUGHES No. 18-631	Randolph (16CRS52805)	No Plain Error.
STATE v. HUGO No. 18-342	Onslow (16CRS51621-23)	No error in part; Dismissed in part
STATE v. KAWELO No. 18-316	Randolph (12CRS52202) (13CRS53866) (14CRS51583)	Vacated and Remanded
STATE v. MILLS No. 18-315	Rowan (15CRS2590) (15CRS51562) (15CRS51564)	No Error
STATE v. MITCHELL No. 18-333	Bladen (15CRS51969) (16CRS33-35)	No plain error in part; dismissed in part; vacated and remanded in part

STATE v. MOONEY No. 18-368	Transylvania (16CRS50708-10) (16CRS50715)	No Error
STATE v. MORALES No. 18-539	Wake (15CRS210198)	No Error
STATE v. REYNOLDS No. 18-445	Surry (15CRS692) (15CRS694)	No Error
STATE v. RICHARDSON No. 17-1313	Transylvania (16CRS51714)	No Error
STATE v. RYCKELEY No. 18-139	Catawba (16CRS1224) (16CRS1464) (16CRS1869)	No Error
STATE v. SINCLAIR No. 18-293	Mecklenburg (16CRS236559) (16CRS236562)	No Plain Error in Part; Dismissed in Part.
STATE v. SMITH No. 18-421	Henderson (16CRS000555)	No Error
STATE v. TERRELL No. 18-237	Mecklenburg (15CRS236592)	REVERSED AND VACATED.
STATE v. WADDELL No. 18-219	New Hanover (16CRS57327)	Affirm
STATE v. WEAVER No. 18-740	Burke (16CRS50291) (17CRS1114)	No error in part; reversed in part and remanded; new sentencing hearing.
STATE v. WEST No. 18-242	Cumberland (13CRS62985) (13CRS63009) (13CRS63523) (13CRS63525) (13CRS63526) (13CRS64535)	Affirmed
SWANSON v. ENLOE No. 18-617	Caldwell (16CVS768)	Dismissed

VEER RIGHT MGMT. GRP., INC. v. CZARNOWSKI DISPLAY SERV., INC. No. 18-420	Wilson (14CVS1038)	AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.
WELCH v. R&M CHARLOTTE LLC No. 17-649	Mecklenburg (16CVD17036)	Affirmed in part; reversed and remanded in part.

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